S. J. Tilden

AN INQUIRY

INTO THE

ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869,

AND

MR. DAVID DUDLEY FIELD'S CONNECTION THEREWITH.

BY

GEORGE TICKNOR CURTIS.

NEW YORK:
D. APPLETON AND COMPANY,
549 & 551 BROADWAY.
1871.

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NOTE.

On or about the 10th of April last, I was requested by an intimate friend of Mr. David Dudley Field, to examine the proceedings in the Albany & Susquehanna Railroad litigations (in 1869) in connection with the complaints made against him in reference thereto, in certain newspapers and other periodicals, and to give my opinion upon the whole matter. I considered this a professional service, especially because from the nature of the subject the tribunal which I should have to address would be mainly composed of the unbiassed and unprejudiced members of my profession. They alone can properly define—each one for himself—the true rules of professional conduct. To their individual judgments, which will form collectively the judgment of the bar, and be accepted by the lay portion of the public who may take the trouble to understand the subject, I submit the following opinion in compliance with the request that has been made of me. When I consented to render this service I had not read any of the complaints made against Mr. Field in the public prints, or the proofs adduced in support of them, or his replies. Of course it became at once my duty to read and to weigh them. I had not at that time any acquaintance with any of the litigations to which those complaints and proofs referred, nor had I ever seen, to my knowledge, a single individual who was connected with any of those proceedings, excepting some of the gentlemen who acted in them professionally, on the one side or the other, nor have I ever had any communication with any one who stood to Mr. Field or his partners in the relation of clients. My investigations have embraced the records of the several litigations in question, and such matters not therein exhibited as seemed to me material subjects of inquiry. In regard to the latter, I have made no statements which I have not personally verified by resorting to the most direct and satisfactory proofs.

GEO. TICKNOR CURTIS.

New York, *May* 10, 1871.

THE ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869.

OPINION.

In order to a right understanding of the history of these litigations, it is necessary to state the position and relations of the Albany & Susquehanna Railroad. This road commences at Albany and terminates at Binghamton, a distance of about one hundred and forty miles. It lies wholly in the State of New York, and is a New York corporation, subject, of course, to the courts of New York in relation to all its corporate rights and duties. The corporation was organized in 1852, and the construction of the road was begun in 1853; it was completed and opened for traffic in January, 1869. Albany is the eastern terminus of the great trunk line known as the New York Central Railroad. Binghamton, in the southeastern part of the State of New York, lies on the Erie Railway, which is another great trunk line extending from a point in Jersey City opposite to the city of New York, through the northern part of New Jersey, and above the northern boundary of Pennsylvania to Dunkirk and Buffalo on Lake Erie. It has access to and connections with the great anthracite coal-fields of Pennsylvania.

In 1869, at the time of the opening of the Albany & Susquehanna Railroad, the Erie Railway was under the management of a Board of Directors, consisting of Jay Gould, A. S. Diven, James Fisk, Jr., Frederick A. Lane, J. C. B. Davis, William M. Tweed, Peter B. Sweeny, Daniel S. Miller, Jr.,

Homer Ramsdell, John Hilton, George M. Groves, John Ganson, Charles G. Sisson, O. W. Chapman, Henry Thompson, and George M. Diven. The Albany & Susquehanna Railroad was under the management of Joseph H. Ramsey, Jacob Leonard, Jeremiah J. Austin, William A. Rice, Jonathan R. Herrick, Charles Courter, John Westover, John Cook, Azro Chase, David Wilber, Eliakim R. Ford, Samuel North, Ira E. Sherman, and Alonzo Everts.

The Albany & Susquehanna Railroad, from its position, was, when completed, capable of being made a connecting link between the Erie Railway and the city of Albany, and from thence with the lines extending from Albany, north and east, into New England; or it might, by being kept from close business relations with the Erie Railway, be kept as a mere line of communication between the cities of Binghamton and Albany, and the towns and regions lying between those places. This capacity of the Albany & Susquehanna Railroad to become an important link by which the coal of Pennsylvania might be made to reach Albany, and thence be distributed to the New England States, by means of a close business relation with the Erie Railway, is an important fact to be stated here; because that relation is and has been regarded as one of the main motives which are said to have actuated the managers of the Erie Railway in their efforts to assist those who wished to retain the control of the Albany and Susquehanna Railroad. So far as this motive is an element in forming a correct opinion as to the conduct of any person who may have been concerned as a lawyer in any of the matters involved in the contest for the majority of the direction in the last-mentioned corporation, it ought to be distinctly stated that it was desirable to the Erie Railway Company to have the Albany & Susquehanna Railroad become a connecting link by which the anthracite coal from the great coal-beds of Pennsylvania could be made to reach the coal-consumers of New England more directly and cheaply than it otherwise could reach them.[1]

[1] In 1869 the coal-traffic of the Erie Railway was 1,038,000 tons.

But there is another fact which, with equal fairness, ought also to be stated. Before the Albany & Susquehanna Railroad was finished, and, therefore, before it was capable of becoming practically connected with the Erie Railway, there was a condition of dissatisfaction among its stockholders and directors, who were to some extent scattered along its line, concerning its financial management. At the election of its directors in 1868, by the choice of the stockholders, a majority of directors, representing a decided opposition to Mr. Ramsey, were chosen; so that when the election of 1869 was approaching, there was an open contest between two parties in this corporation to obtain a majority of the new Board of Directors, wholly independent of any question of connection with the Erie Railway, and growing out of differences that had sprung up within the corporation itself as to the financial policy which had been pursued by Mr. Ramsey in building and managing the road. Mr. Ramsey and his friends were at this time a minority of the board; his opponents were the majority; and each party was anxious at the approaching election to secure the control of the new board.

The condition of the stock of the Albany & Susquehanna Railroad Company at this time was as follows: Its authorized capital was $4,000,000 (40,000 shares). There had been issued $1,723,800 (17,238 shares), which were undisputed. Of the original subscriptions, a considerable amount had been forfeited to the company for non-payment of assessments;[1] and of this amount there were at least $300,000 (3,000 shares) which were alleged to have been reissued to parties who had not paid more than 25 per cent. of the par, and which were therefore disputed. Assuming that no greater amount of the forfeited stock had been reissued, there remained in the hands of the company 19,762 shares.

The party desiring to oust Mr. Ramsey from the management (which for convenience may be called the Church

[1] The original subscribers of this forfeited stock had paid, as required by law, 10 per cent.

party),[1] were obliged to rely upon what they held or could obtain of the portion of the stock (17,238 shares) that had been previously issued, and about the issue of which there could be no question. In such a situation, the attitude of the two parties within this corporation would inevitably lead to efforts on the side of the Church party to obtain the right of voting on so much of the 17,238 shares of undisputed stock as they could command, and to watch and control any proceedings of the Ramsey party to make an improper use of portions of the forfeited stock or of the stock that had not up to this time been subscribed for. On the other hand, the effort of the Ramsey party would be to increase their ownership or control of so much of the 17,238 shares of undisputed stock as they could command, to add from the forfeited stock (if it was rightfully reissued) and from stock not as yet subscribed for, so much as might be needful to secure a majority of the voting power, and to watch and control any attempts of the Church party to vote upon stock not entitled to be represented in the vote for directors, or not entitled to be voted upon by the persons who should undertake to claim that right. I state these as the objects at which the two parties might be expected respectively to aim, because they were on the one side and the other lawful and proper objects in themselves. They could be pursued by lawful, proper, and fair means; they might possibly be sought to be accomplished by unlawful, improper, and unfair means. Whatever was the danger arising from a temptation to use means that might be either illegal or improper, any fair investigation into the conduct of either of these parties must assume that there was a lawful and proper object which each could seek to accomplish by lawful and proper means. The object of each party was to elect a majority of the Board of Directors at the election which was to take place on the 7th of September (1869); and this could only be done by each party voting on all the

[1] Mr. Walter S. Church was the leading candidate on the ticket for directors in opposition to Mr. Ramsey, voted for in 1869, and was chosen President by that board.

stock on which it could lawfully obtain the right to vote, and by each preventing its adversary from voting on stock not entitled to be voted on, or not entitled to be voted on by the persons who might undertake to use it. Moreover, in such an investigation as I design to make into the proceedings of these parties, I shall assume that each of them is entitled to the presumption, at the outset, that none but lawful and proper means would be used to accomplish their objects.

Beginning then with the Church party, it is proper to state here that at an early period in the preparation for this contest, some of the leading persons among them, under the circumstances hereinafter stated, sought the aid of Messrs. Fisk and Gould, officers of the Erie Railway, to assist them in acquiring the right to vote on so much of the 17,238 shares of stock, then in the hands of *bona fide* holders, as could be commanded. This required a large amount of money. Was it a lawful and proper thing to be done? On this point no doubt whatever can be entertained, if it was lawful and proper for the Ramsey party to obtain the control of any portion of the same stock, or of any portion of the stock remaining in the hands of the company. It was furthermore perfectly natural and right for the Church party (if they considered it to be for the interest of the Albany & Susquehanna Railroad, of which they then were a majority of the directors, to bring about a close business connection with the Erie Railway) to seek the assistance of the leading managers of that road in accomplishing the object which they had in view; just as it was, on the other hand, perfectly natural and right for the Ramsey party, if they deprecated any connection with the Erie Railway, or for any other reason wished to prevent the Church party from continuing to be a majority of the Board of Directors of the Susquehanna Road, to use all lawful and proper means to accomplish *their* objects.

In pursuance, then, of what must be regarded as in itself a lawful and proper object, the Church party proceeded, with the aid of Fisk and Gould, to purchase

stock of the Susquehanna Road then in the stock market, and to obtain from individuals and towns on the line of the road the right to vote on stock held by such individuals or towns, by obtaining either transfers or proxies or pledges of votes. Among the directors who represented the dissatisfaction with Mr. Ramsey's management of the road, were Mr. Leonard, who lived at Albany, Mr. Wilber, who lived at Milford, but whose place of business was in the adjoining town of Oneonta, and Mr. North, who lived at Unadilla. These two towns, Oneonta and Unadilla, were on the line of the road, and both of them held stock in the company. In the month of July, Messrs. Leonard, Wilber, and North, in preparation for the election, applied to Messrs. Gould and Fisk for assistance in purchasing stock of the company. They represented that with the stock they already had, and the stock of such towns as they knew to be favorable to their views, they already had a majority of the stock, but to guard against Mr. Ramsey's proceedings they considered it desirable to purchase more. They stated to Mr. Gould that they could pledge the stock of Cobleskill, Milford, and Unadilla, to vote for the Church ticket of directors. Mr. Wilber was one of the town commissioners for holding the stock of Milford, Mr. C. Courter, another of the directors in the same interest, was one of the commissioners for Cobleskill, and Mr. Chase was one of the commissioners for Maryland. Mr. North could command the vote on the stock of Unadilla. They considered, therefore, that the four towns of Cobleskill, Unadilla, Maryland, and Milford, were sure to vote against the Ramsey ticket, as the tax-payers of those towns had been opposed all along to Mr. Ramsey's management, and were anxious, moreover, to avail themselves of the first opportunity to have the stock of their towns sold at par. Messrs. Leonard, Wilber, and North, represented to Mr. Gould that although they believed that a decided majority of the stockholders were opposed to Mr. Ramsey, they desired to place the election beyond peradventure by purchasing stock which they did not then control. Mr. Gould concluded, after deliberation, to assist them, and au-

thorized them to buy stock in the market for him, but not in his name. This was done to some extent. As the controversy became warmer, and there was reason to doubt how the commissioners of some of the towns would act, these directors urged Mr. Gould to furnish the funds necessary to buy the stock of some of the other towns. This was done with the stock of several towns, and the stock was transferred on the books, but when the stock of the town of Oneonta, purchased by Wilber, was presented for transfer, the town commissioners being present, the treasurer refused to transfer it. On the next day an injunction, obtained from Judge J. M. Parker, against its transfer was served, and before this injunction could be removed the books were clandestinely removed from the office of the company;—they were hidden for a time in a tomb in a graveyard in Albany, and were afterward carried from place to place, remaining concealed for a whole month. Agreements were then made by which the stock of Oneonta and Colesville was contracted to the Church party, to be paid for when transfers could be made. The stock of Davenport was purchased, and the full amount paid for it, but the transfer was refused. When the election came on, the stock of Davenport was voted on by Mr. Harris under proxies from Mr. Gould and from the town commissioners. He also voted on the stock of Oneonta (purchased by Wilber) under proxies from Wilber and from the town commissioners. He also voted on the stock of Colesville purchased by North, but without any proxy from the commissioners. The stock of other towns, Seward, Summit, and Westford, were purchased, and transfers made to the Church party before the books were taken away. The towns of Cobleskill, Unadilla, Maryland, and Milford, through their commissioners, gave proxies to the Church party, and Mr. Harris voted on them, the commissioners being present. Besides holding the proxies, Mr. Harris also voted under an assignment of the stock of these four towns embraced in their agreement to vote for the Church directors.

It is now necessary to describe a movement made by the

Ramsey party. That movement consisted in a resort by Mr. Ramsey and his friends, to the shares still remaining unissued and unsubscribed for in the hands of the company. On the evening of the 5th of August, Mr. Ramsey assembled the minority of the then directors, at his house, having an old stock subscription-book of the company with him. They subscribed among them for 9,500 shares, on the understanding that the subscribers individually were to make no present payments, but that ten per cent. should be paid in immediately, for which Mr. Ramsey was to provide; *the remainder to be called in when and as the board of directors expected to be chosen by the aid of this stock might direct.* It was further agreed, that if any of the subscribers did not wish to keep their stock, Mr. Ramsey should take it off their hands after the election. Mr. Ramsey, therefore, had to raise immediately $95,000, to pay in the ten per cent. on these subscriptions for 9,500 shares. To accomplish this, he drew a draft for $100,000 on David Groesbeck, who cashed it; and to secure Groesbeck, Mr. Ramsey deposited with him as collateral security $150,000 *of the equipment bonds of the company, belonging to the company, and which Mr. Ramsey obtained from the Treasurer for this purpose.* The ten per cent. being thus paid in, the 9,500 shares were credited on the books of the company to the supposed subscribers, and they gave their proxies to Mr. Ramsey to vote at the coming election.

It has been said of this transaction, that while "its legality is open to criticism," and "its good faith even might well have been suspected," it was "justifiable" under the circumstances.[1] The circumstances alleged in its justification are, that Mr. Ramsey "was fighting men who had set the most infamous precedents ever known for transactions of a not dissimilar character;" that the "positions" of "these men in the community, their standing in the courts, their financial and fiduciary relations, were notorious." The amount of these excuses is that Messrs. Fisk and Gould were men whose reputations for fair dealing were

[1] North American Review for April, 1871, Article "An Erie Raid."

bad; not that they had thus far done any thing in regard to this particular corporation that could be regarded as fraudulent, but that they had set "infamous precedents" in other affairs, that they might therefore be expected to act like knaves in this contest, and hence that it was necessary to fight them with weapons of the kind which it was said they were accustomed to use. I presume it must be unnecessary for me to say to any class of readers, whose opinion is of the slightest consequence, that the alleged bad reputation of the men Mr. Ramsey was "fighting," can afford neither legal nor moral justification for any act of his, that was either illegal or wrong in itself; and that it is by its own intrinsic character, that both the legality and the morality of this transaction must be judged. If the kind of justification or apology which has been set up for this transaction, is to be admitted as a test of its legality or morality, then the same rule must be applied to any subsequent act done by the opposite party, who must be acquitted of wrong by the "precedents" afforded by their opponents. No such rule will be followed in the present examination of these occurrences.

Up to this point, namely, the 5th of August, there had been sundry suits commenced. The first that was commenced by the Ramsey party was a suit in the name of the town of Oneonta, against the company and David Wilber, commenced August 2d, in Otsego County, in the interest of the Ramsey party, to restrain the transfer of 700 shares of stock purchased of the town commissioners by Wilber, who was in the interest of the Church party.[1] An *ex parte* injunction was granted by Judge J. M. Parker of the Supreme Court. It was promptly dissolved, on the 5th of August, on proof that Wilber had purchased the stock in good faith and for full par value.[2]

On the 4th of August two suits were commenced by

[1] A suit instituted by Bush on the same day, will be described hereafter.

[2] I understand that no service of any injunction or other papers in this case has been made upon any one excepting Phelps, the Treasurer of the company.

David Wilber in the Supreme Court for the City and County of New York. The first was a suit against the Albany & Susquehanna Railroad Company, Ramsey, its President, and Phelps, its Treasurer, to compel the transfer to Wilber on the books of the company of the stock which he had bought of the town of Oneonta (700 shares) and certain other stock which he had bought of the town of Worcester. The plaintiff alleged in his complaint that he had presented the certificates to Phelps the Treasurer, for transfer, and that the transfer had been refused, on the pretence that the plaintiff had not paid par to the towns for the stock, "*which pretence*" the plaintiff alleged "*was untrue.*" This allegation the plaintiff supported by his own oath, and of course the fact was within his own knowledge. He also alleged, on his information and belief, that Phelps, in refusing to transfer his stock, acted in the interest of Ramsey to prevent the plaintiff from voting on the stock at the approaching election. Whether this was true or not was not material to the plaintiff's right to have his stock transferred. What it was material for the judge to know was, whether the objection to the plaintiff's title made by the Treasurer, was true or untrue; and he was informed that it was untrue, by the oath of the plaintiff. Judge Barnard granted an order (on the same day, August 4th) directing the defendants to refrain from their refusal to transfer the stock, and to refrain from their refusal to issue certificates to the plaintiff, until the further order of the Court.

Was this a proper order to be granted? I can see no reason to question it. It was, undoubtedly, an *ex parte* order; but the relief which it gave, was a relief to which the plaintiff was instantly entitled, if the judge believed that par value had been paid for the stock, and this he was bound to believe on the oath of the plaintiff that the Treasurer's assigned reason for refusing to transfer was untrue, for all the purposes of the order which the order was made to embrace. By reserving to the defendants an opportunity to come in and ask for a "further order," the judge protected them in the right to contest the plaintiff's title to the

stock if they should choose to contest it. What he protected the plaintiff in, was the right to vote on the stock, on the title which he had shown, provided that the defendants should not controvert that title.

The other suit by Wilber was a suit commenced in the Supreme Court, in the County of New York, on the 4th of August, in his capacity as a director of the company, making the company, Ramsey, the President, and all the other directors co-defendants. The complaint alleged that Ramsey, the President, had at various previous times issued 3,000 shares of the stock of the company to various persons as full-paid stock, when none of such persons had paid more than 25 per cent. of the par value; that he had ordered the Treasurer not to transfer other stock to persons who had bought it; that he had caused collusive suits to be brought for the purpose of preventing *bona fide* owners of a majority of the stock from voting at the coming election of directors; that the transfer-books would be closed on the 7th of August, and that Ramsey was seeking to prevent a fair election; that 44 shares of stock had been issued to one Goodyear without payment of the par value by him to the company, and solely on the false pretence that the company owed Goodyear a debt: and that this issue of stock was in fact made to Goodyear for the purpose of creating votes in favor of Ramsey as a director. This complaint was supported by the positive oath of the plaintiff in respect to the election, the closing of the books, and the wrongful issue of stock to Goodyear, all of which allegations were stated by the plaintiff as within his personal knowledge. In other respects, the complaint rested on information and belief. The complaint prayed for the removal of Ramsey from the offices of President and director; that he be suspended from exercising those offices; that all the defendants be restrained from issuing any stock of the company, except upon subscriptions made in pursuance of a resolution of the Board of Directors, and after public notice of the time and place for making subscriptions, and on cash payments of the par value or upward. Judge Barnard on

the same day (August 4th) made an order covering but a part of the relief sought. The order recited that it appeared satisfactorily to the judge, on the complaint duly verified by the plaintiff, that sufficient grounds for an injunction existed; it directed that the defendants, and each of them, and their agents, refrain from creating or issuing stock except upon subscriptions made after public notice, and at or over the par value paid in cash; and that Ramsey *refrain from exercising* the offices of President and director, and from issuing any stock, or in any way interfering in the affairs of the company, *until the further order of the court.* This order was served on Mr. Ramsey on the 4th or the 5th of August.

Was this a proper order to be granted on this complaint and its verification? The order had two branches. In one part of it, it restrained every officer of the company from issuing any stock, excepting in a mode of proceeding which would in no way cripple the company in its efforts to realize money on any of its stock yet unsubscribed for, and at the same time it protected the company and the *bona fide* stockholders from just such issues as those which were arranged by Mr. Ramsey on the 5th of August, the very next day after this order was made, and after it had been served upon him. It is true that this occurrence had not happened when the order was made; but its happening within a little more than twenty-four hours is a good illustration of the bearing of the order on the interests of the company. It is true, also, that the complaint gave the court no information that those issues arranged for on the 5th of August were contemplated or threatened; but it did allege positively as to a part, and as to the rest on the plaintiff's information and belief, that wrongful issues of large amounts of stock had theretofore been made, and the plaintiff thus attesting his information and belief of this fact was himself a director. Considering that a contested election of directors was approaching, I think that a judge exercising the powers of a court of equity, when he went no further in ordering a mode of proceeding in the sale and issue of stock, than the protection of the company and the law itself

required, acted wisely, especially as he reserved to the directors a power to come before the court, which was always open, and have the order modified, if it should work any inconvenience. As to that part of the order which *suspended* Mr. Ramsey from the present exercise of the offices of President and director until the further order of the court, it is to be remembered that this corporation had thirteen other directors, among them a Vice-President, who could attend to all the business of the election, and all other affairs of the company; that the order in no way interfered with Mr. Ramsey's candidacy for a re-election as director; and that it simply created a practical vacancy in the office of President, until Mr. Ramsey should choose to ask to be restored to the exercise of his office. If it is said that the judge should have required more positive evidence of Mr. Ramsey's alleged previous misconduct in his office, and that it was improvident or improper to suspend him from it on an allegation of facts supported only by the information and belief of the plaintiff, I think that the facts that the plaintiff was himself a director, that all the other directors were made defendants, that Ramsey and the other directors, or any of them, could immediately have had this order rescinded if the plaintiff's allegations were not true, that there was a positive averment of a wrongful issue of stock to Goodyear, and that the reëlection of the new board was not to happen for more than a month, brought the application within the discretion which a judge may exercise in granting injunctions, when he is not required by statute to issue a notice to show cause before taking any action. In this case, the discretionary power does not appear to have been exercised in a manner to do any injury to the interests of the company.

But it has been objected to this order that it was granted without proper evidence of Ramsey's alleged misconduct in his office, because the sole evidence in support of the complaint was, as it is said, the oath of Wilber, the plaintiff, to his "information and belief" of the facts of that misconduct. A proper analysis of the complaint and the *jurat* shows that

a material part of the facts alleged were sworn to be within the knowledge of the plaintiff. As to the matters stated, and sworn to be stated, upon information and belief, I am not prepared to admit that it was not proper for the judge to regard at all what was stated on the plaintiff's information and belief. If we concede the general principle that an injunction is not to be granted on mere information and belief, there was yet enough averred in this complaint, on the plaintiff's own knowledge, to support the injunction. Thus, the facts that the plaintiff was a director, that Ramsey was President, that Phelps was Treasurer, that there was to be an election on the 7th of September, that the transfer-books were to be closed on the 7th of August, that 44 shares had been issued to Goodyear without payment of the par value, and that no debt from the company to Goodyear had been audited by the board or their committee, having the sole power to audit claims, were all averred positively in the complaint, and were all within the general rule which makes the plaintiff's verification of facts so averred by his oath to the complaint, sufficient evidence. Will it be said that it was improper in the judge to connect these facts with the facts averred and verified on the plaintiff's information and belief, respecting Ramsey's complicity with this wrongful issue of stock to Goodyear, and with his alleged wrongful issue of stock to other parties? That depends upon the proper application of the general rule which declares that mere information and belief is not evidence. Although, as a general rule, information and belief is not legal evidence, it may, *under certain circumstances*, furnish sufficient ground for granting a motion. Thus, if the party against whom a fact is sworn on information and belief must know whether the allegation is true or false, and he is silent, there is reasonable ground for presuming existence of the fact.[1] In like manner, where the question was whether the defendant had purchased certain stock with the money of an intestate estate of which he was administrator, and the plaintiff, on a motion for an injunction, made affidavit that, from his ac-

[1] Oakley *v.* Aspinwall, 3 New York R. 559, *per* Bronson, Chief Justice.

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Curtis, George Ticknor

An inquiry into the Albany and Susquehanna railroad litigations of 1869, and Mr. David Dudley Field's connection therewith. New Yrok, Appleton, 1871.

quaintance with the defendant's insolvent circumstances, he *believed* that he could not have purchased the stock excepting with money of the estate, *and that he had applied to the defendant's stock-brokers to inform him of the truth of the fact, and the information was refused*, the Court of Exchequer held that the evidence was sufficient to grant the injunction, because the party whom the statement was meant to affect had had an opportunity to deny it and had not done so.[1] Let this decision be compared with one of the allegations of this complaint, positively sworn to by the plaintiff, who averred that he had been informed by the clerk in charge of the transfer-book that the issue of stock was made to Goodyear by the order of Ramsey, under pretence that some indefinite amount of money was due from the company to Goodyear.

The general rule that a bill or complaint, in order to afford foundation for an *ex parte* injunction, must be supported in its averments by something more than the plaintiff's information and belief, relates to cases where the bill or complaint, in respect to all its allegations of fact, rests on information and belief alone. Yet, in such a case, there may be a temporary injunction, with an order to show cause. In Campbell *v.* Morrison, 7 Paige, 157, 161, Chancellor Walworth said: "In cases of emergency, where serious injury would probably be done to the complainant before a reasonable time to show cause would expire, the master, upon a bill thus framed [on information and belief *alone*], may allow a temporary injunction in the mean time; which fails, of course, when the time for showing cause arrives, if not continued by the court." This was precisely the character of the injunction by which Judge Barnard suspended Ramsey from the office of President, and, moreover, the complaint was not founded on information and belief alone. Indeed, it is the general practice to grant such injunctions on information and belief. It will be seen hereafter that several such injunctions were granted by Judge Peckham to the Ramsey party on *mere* information and belief. I have not heard

[1] Scott v. Becher, 4 Price, 346–352; 2 Exchequer R., 137, 139.

that the counsel who advised, or the attorneys who procured them have been censured; and yet, Field & Shearman have been denounced as guilty of the grossest impropriety of professional conduct for doing what the critics have overlooked in their adversaries. I do not cite what was done by their adversaries as a justification, if it was illegally done. But I cite it as proof of a general and prevalent practice of the courts to receive statements sworn to be made on information and belief as evidence to be regarded in granting injunctions; and I must add that, in the Albany proceedings in these litigations, the practice was carried to a very great length, for none of the *jurats* in any of the Ramsey suits (I believe I have examined them all) made the allegations of the complaints to rest upon any thing more than information and belief.

It may be proper to state here, for the information of those who are not familiar with the statute law of New York, that this suspension of Mr. Ramsey from the exercise of the office of President of this corporation, was the exercise of a power vested in the court from which the injunction emanated. By the Revised Statutes, Part III., chap. viii., Art. 2, § 33, it was declared: "The chancellor shall have jurisdiction over directors, managers, and other trustees and officers of corporations, ... 3, to *suspend* any such trustee or officer from exercising his office, whenever it shall *appear* that he has *abused his trust:* 4, to *remove* any such trustee or officer from his office, upon *proof* or *conviction* of *gross misconduct.*" § 35. "The jurisdiction conferred by the preceding thirty-third section, shall be exercised *as in ordinary cases, on bill or petition*, as the case may require, or, the chancellor may direct, at the instance of the Attorney-General, prosecuting in behalf of the people of this State, or at the instance of any creditor of such corporation, *or at the instance of any director*, trustee, or other officer of such corporation having a general superintendence of its concerns." This ample jurisdiction passed by the Constitution of 1847 to the Supreme Court.

It is to be observed here that the orders hitherto made

by Judge Barnard, two only, afforded to Wilber, the plaintiff, the provisional relief to which he was entitled, and, at the same time, afforded to the defendants power to have them rescinded or modified, whenever they should appear before the court and offer proofs that Wilber was not entitled to the relief which the orders had given him. If the allegations of his complaints were not true, the defendants could at any moment have shown that the orders ought to be rescinded or changed; and, whether it can or cannot be said that the order suspending Ramsey from acting as President was improvidently granted, there can be no pretence that it was void. It was therefore entitled to be obeyed. But if I read the history of Mr. Ramsey's proceedings rightly, this order was not obeyed, although no attempt was made to have it set aside or modified, nor was that part of the order obeyed which restrained the issue of new stock excepting upon certain terms and in a certain mode, nor was any application made to the court to vacate or change it. On the contrary, Mr. Ramsey proceeded on that day, August 5th (no doubt under advice of counsel, but nevertheless as it seems to me under a mistaken idea of what he could lawfully do), to do acts which violated both branches of Judge Barnard's order of August 4th. These acts were official acts as President, and the order had suspended him from the exercise of that office. One of them consisted in taking the subscriptions for 9,500 shares of stock, as above described, on the evening of August 5th, and constituting the alleged subscribers stockholders of the company. The other consisted in instituting a suit in the Supreme Court in Albany County of a retaliatory nature, *in the name of the corporation*, against four of the directors, Leonard, Herrick, North, and Wilber, and making Phelps, the Treasurer, a co-defendant. This complaint alleged, on information and belief, *inter alia*, that the four directors named defendants had entered into a wicked and corrupt conspiracy and combination with Jay Gould and others, managers of the Erie Railway, to transfer the corporate property and franchises of the plaintiff, and its whole control and management, to the corpora-

tion known as the Erie Railway Company, which last-mentioned Company it averred was managed and controlled by Jay Gould and others for their own selfish purposes of stock speculation and other private ends, and not in the true interests of the said Erie Railway Company, and that the success of the conspirators in transferring the plaintiff's company to the same control and management would ruin it. The complaint further alleged as acts of the conspirators, in pursuance of their corrupt and wicked purpose, the commencement of suits by Wilber, one of the defendants, on false allegations, and the obtaining of an injunction issued by Judge Barnard, *ex parte*, in the city of New York, where none of the parties resided, suspending Ramsey, President of the plaintiff corporation, from acting in that office, with the purpose of preventing him from so acting at a meeting of the directors to be held on the same day when the injunction was served, and to get the aid of Herrick as Vice-President, acting as President, in furtherance of the general object of the conspiracy; that the injunction was obtained by fraud and falsehood; that the 3,000 shares alleged in Wilber's complaint to have been wrongfully issued by Ramsey were lawfully and rightfully issued; that the other allegations of Wilber in his said complaint were untrue; and that the Wilber suit was instituted and the injunction suspending Ramsey from acting as President was obtained in pursuance of the conspiracy to transfer the plaintiff's property and the management of its road to Jay Gould and others, etc. That Phelps, the Treasurer, might, if not restrained, transfer stock in plaintiff's corporation under the order and direction of the four directors named defendants. The complaint thereupon prayed that the four directors be restrained and enjoined from taking any further steps in pursuance of the conspiracy, and be removed from their positions, and in the mean time be restrained and enjoined from acting as directors, and *that Herrick be restrained from acting as Vice-President*, and that Phelps, the Treasurer, be restrained from transferring any stock by order of these four directors, or by

any resolution of the board carried by their votes, or either of them, and for further relief, etc.

This complaint was sworn to by Mr. Ramsey, *as President*, on the 5th of August, before the Albany County Judge; the affidavit being, that the complaint "is true of his own knowledge, excepting as to those matters therein stated on information and belief, and as to those matters he believes it to be true." As the corporation was the plaintiff, there could be no allegation of knowledge made by the plaintiff. Mr. Ramsey's oath to the complaint, which asserted nothing but that the whole complaint was on information and belief, was made in the capacity of President. The Albany County Judge, acting in the Supreme Court, granted the injunction prayed for on the same day, restraining the four directors named defendants from acting as directors, and from voting at any meeting of the board, until the further order of the Court; and restraining Herrick from acting as Vice-President (without saying until further order), and also restraining the Treasurer, Phelps, from complying with any direction or demand of the other defendants with reference to the disposition or custody of the books and papers of the company, or with any resolution of the board carried by their votes, until the further order of the Court.

Whether such a suit as this could be instituted in the name of a corporation without a vote of the Board of Directors or of its Executive Committee expressly authorizing it, admits, of course, of the gravest doubt.[1] Whether the President could have instituted it in his own private name, although he was under an injunction suspending him from the exercise of his office, is another matter; but, instituted in the name of the corporation, it was one of the highest corporate acts that could be performed, and in so instituting it Mr. Ramsey necessarily acted as President, and he so described himself in the *jurat*. He could not have determined to take this step without having determined to disobey the injunction of Judge Barnard, which

[1] It was not authorized by statute.

had suspended him from the exercise of his office; and it is a remarkable proof of such a determination, that all the facts of conspiracy, etc., alleged in this suit, could, if true, have been presented on affidavits to Judge Barnard, on an application to vacate his order suspending Mr. Ramsey from acting as President, and (if the order had been vacated) he would then have been free to effect the removal of his four co-directors from office, in his capacity of President, if there were facts and law to warrant it.

The reader, therefore, who has thus far followed the history of the two parties within this corporation, must now observe that he has arrived at a period when the leading person at the head of one of them has determined that he will not obey an injunction issued by a judge of the Supreme Court, although he has an opportunity to apply to have it vacated. Am I to discuss the question whether this determination was made in reference to the orders of the particular judge, and to enter into conjectures whether it was due to a belief that Judge Barnard himself was a party to the alleged conspiracy? Until I hear of an impeachment of a judge and his removal from office, I will not so disgrace the judiciary of the State as to inquire for any man's reasons for disobeying his official orders, or seek to know whether they are founded in scandal more or less in general circulation. I know of nothing that can justify any breach of a judicial order made by a judge in office; and I beg to say to the public who may read these observations, that when once it is supposed, for any cause, that the orders of one judge are entitled to less respect than the orders of any other judge, the orders of all judges may be set at defiance by any party who does not choose to obey them. But it is the less necessary to inquire whether Mr. Ramsay thought that *Judge Barnard's* orders could be disobeyed with impunity, because he averred in this complaint that Judge Barnard's orders were obtained from him by fraud and falsehood; not that they were made corruptly. If the orders were obtained by a fraud upon the judge, they could have been vacated on showing to him, or any other

judge of the Supreme Court in New York County, that fraud. To disobey and violate the orders of a judge, on the ground that he was imposed on when he issued them, without *asking him*, or any competent authority, to rescind them, is an act without any excuse.

The reader has also now to notice the situation of this corporation on the close of that day, the 5th of August. Ramsey, the President, was restrained from acting in that capacity or as a director. Leonard, Herrick, North, and Wilber, four of the (Church) directors, were suspended from their offices; and Herrick, the Vice-President, was in like manner prohibited from exercising in any way the duties of his office. Out of fourteen directors, therefore, there remained eight having at that time a legal competency to act. But neither the charter nor the by-laws made any provision for appointing an acting President in the absence or incapacity of both the President and Vice-President. Moreover, the management of all the business of the road was in the hands of an Executive Committee of five directors; and a majority of this committee were made incapable of acting by the operation of Judge Clute's injunction. Without violating an injunction of the Supreme Court, the business of the company could not be carried on in the manner prescribed by its charter and by-laws. Payments could only be made by a warrant or check signed by a majority of the Executive Committee; and, besides all its employés and servants, who were to be paid monthly, the company had other large obligations falling due within sixty days.

The only alternative was to place the road in the hands of a receiver or receivers. It could not be run for a week without being so placed. Accordingly, on the 6th of August, a suit was instituted in the Supreme Court in the City and County of New York by Azro Chase, a stockholder and a director, against the corporation and all the other directors as co-defendants. The complaint contained two classes of allegations as the grounds on which the interposition of the Court was asked. One class of facts, averred on the information and belief of the plaintiff, related to

Ramsey the President's alleged misconduct in issuing stock unlawfully for the purpose of creating votes for himself at the approaching election, and in obstructing the transfer of stock on the books for the purpose of preventing a fair election. The other class of facts, averred positively and supported by the plaintiff's oath as within his own knowledge, related to the present situation of the company under the injunction which had suspended four of its directors, and that suspending Ramsey its President; its incapacity to make an acting President; the fact that the Executive Committee were incapable of acting, and that the business of the company could not be carried on according to its charter and by-laws without violating one or more injunctions of the Supreme Court, and the pressing nature of its business engagements. The complaint prayed for the suspension or removal of Ramsey from the offices of President and director, and for a receiver of all the property of the company, to administer the same under the direction of the Court, with the usual powers, until a full and legal meeting of the directors could act on the appointment of a new President without violating any injunction. Under this complaint Judge Barnard, on the 6th of August, made the following order, the original of which is now before me :

SUPREME COURT.

AZRO CHASE

against

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY, JOSEPH H. RAMSEY, JEREMIAH J. AUSTIN, JACOB LEONARD, WILLIAM A. RICE, CHARLES COURTER, JOHN WESTOVER, JOHN COOK, DAVID WILBER, ELIAKIM R. FORD, SAMUEL NORTH, IRA E. SHERMAN, ALONZO EVERTS, AND JONATHAN R. HERRICK.

On the complaint in this action and the affidavits hereto annexed, and the consent of sundry defendants, I do order that Charles Courter and James Fisk, Jr., be and they are hereby appointed receivers of all the property, franchises and effects of the Albany & Susquehanna Railroad Company, with all the powers and authority of receivers in like cases; that the said receivers file with the clerk of this court, or deposit with a judge thereof, to be afterward filed, a bond with two sufficient sureties, in the penalty of one hundred thousand dollars, for the faithful performance of their duties; that they take immediate possession of the said property, receive all moneys and make all payments necessary or proper for the due operation of the road; that they have power to employ counsel and such assistants as they may require; that they pay for the legal expenses attending their

appointment, and that they be empowered to do all things which any or all of the existing officers, agents and servants might lawfully do. That said receivers shall not be personally liable, except for their wilful wrongs or gross personal negligence.

And let the defendants show cause before me, at a Special Term of this Court, at the Court-House in New York City, on the 16th day of August, 1869, at noon, why this order should not stand, and a further order be made in the premises.

New York, *August* 6, 1869.

George G. Barnard, J. S. C.

We consent to the making of the annexed order:

New York, *August* 6, 1869.

Samuel North,
Azro Chase,
Alonzo Everts,
J. R. Herrick,
David Wilber,
Jacob Leonard,
C. Courter,
The Albany & Susquehanna R. R. Co.
J. R. Herrick, V. P.

That this was an order proper to be made, under the circumstances set forth in the complaint and verified by the oath of a director and his knowledge of the facts, seems to me entirely clear. It will be observed that the order took no action in regard to the averments made on information and belief, as grounds for the removal or suspension of Ramsey, but that it acted only on the receivership, the grounds for which were duly verified. Those grounds being duly verified, the receivership seems to have been a necessity, pressing and immediate; and as the order directed notice to the defendants to show cause at a Special Term in the City of New York, on the 16th day of August, before the judge who

issued it, why it should not stand, and a further order be made, there can be no just pretence to say, as has been said, that this receivership was obtained in order that by having the control of the road and its property the receivers might by means of that control fraudulently or unfairly carry an election of directors that was not to be held until the 7th of September. In fact, a similar charge is just as applicable to a receivership obtained in Albany on the same day and about the same hour by the Ramsey party, which will be described hereafter, as it is to the receivership obtained in the City of New York.

But there are circumstances said to have been connected with the granting of this receivership by Judge Barnard, which it has been a part of my duty to investigate, and to which I now invite the reader's attention. Many things have been said or insinuated about this matter which are entirely unfounded. The charge that has been made is virtually, that Judge Barnard was acting collusively with the parties who obtained this order, to assist them in carrying out their unlawful conspiracy for obtaining the means of effecting a fraudulent or unfair election of directors. He has been called "the favorite judge of these litigants,"[1] and it has been said that Field & Shearman, their attorneys, must have known that he was so. In proof of this telegrams have been hunted up and most improperly given up by some telegraph office or operator, in shameful violation of the clear duty of the telegraph, which have been published as proofs that Judge Barnard was resorted to to grant this receivership, because he was "the favorite judge of these litigants," and that as such he was very willing to aid them. This whole matter is capable of a simple and natural explanation.

On the 6th of August, Judge Barnard was necessarily absent from his official duties in Special Term at Chambers, attending the bedside of a very near relative (his mother), in Poughkeepsie, who was dangerously ill. In the early part of that day, it appears from the published telegrams, a

[1] General Barlow's letter.

dispatch signed by James H. Coleman[1] was sent to Judge Barnard from the City of New York, informing him that certain matters of business in which the City Corporation counsel was concerned, had been postponed to the following Monday, and ending with the inquiry, "How is your mother?" About the hour of 5.30 that afternoon, Judge Barnard answered this dispatch with the information that his mother was "very low." At a later period in that evening it appears from a dispatch that has been published as "No. 3," that the following was sent to Judge Barnard: "[No. 3.] Hon. G. G. Barnard, Poughkeepsie. Come to New York without fail to-night. Answer care 359 West Twenty-third Street.
1. 15 D. H. Fisk's pass 550. James H. Coleman."

The obvious construction of this dispatch, as Judge Barnard must have read it, was, that his friend Mr. Coleman meant to inform him that there was urgent judicial business requiring his presence in this city that night, and as he was the judge assigned to hold the Special Term during that month, and, as he understood that all the other judges were absent from the city, he felt bound to comply with the summons. But comment has been made on the fact that this dispatch went under Mr. Fisk's pass, and that No. 359 West Twenty-third Street was "the house of Mrs. Mansfield, where Mr. Fisk was a frequent visitor."[2] I do not perceive that the fact that Mr. Fisk paid or franked the dispatch, is in any degree material, or that it should have attracted Judge Barnard's attention, if it had been on the copy that was delivered to him. But it was not on that copy. If it had been, it could not have affected his construction of the dispatch; and as to the house to which he was requested to send his *answer*, it will be seen presently what that has to do with the matter. Judge Barnard's answer, published as No. 4, was the following:

[1] Coleman was an intimate personal friend of Judge Barnard, in no way connected with these litigations.

[2] General Barlow's letter.

"POUGHKEEPSIE, *August 6th.*

"To James H. Coleman, care No. 359 West Twenty-third Street. I will be there, if sent by you.

"Answer.

"9. Col. 30. G. G. BARNARD."

The meaning of this answer was, "If you, *Coleman*, have sent for me, I will be *there;*" not at 359 West Twenty-third Street, but in the City of New York. Whether any more dispatches passed, the telegraph-office has not enabled the searchers to state; but the fact is, Judge Barnard came to the city that evening at a late hour, and the order was signed as he was on his way from the Hudson River Railroad Station, which is in Twenty-ninth Street, to his own house, which is in Twenty-first Street between the Sixth and Fifth Avenues.

But it has been insinuated that Judge Barnard signed the order appointing Fisk and Courter receivers, at the house of Mrs. Mansfield, where it is argued or surmised he was found by Mr. Sterling, a partner of Field & Shearman, who proceeded with the papers of the application from Mr. Shearman, who had prepared them at a room in the Opera-House, on the corner of Twenty-third Street and Eighth Avenue, between the hours of 10.20 and 10.35 P. M., to find Judge Barnard. But the fact is that Judge Barnard did *not* sign the order at Mrs. Mansfield's house, or at any place where it was improper for him to transact such business; but he was met in the street by Mr. Sterling, went into the nearest place then open, which appeared to him to be a real-estate office, there examined the papers of the application, heard Mr. Sterling's statements, and signed the order where he happened to have stopped on his way to his own house, after leaving the railroad station. What is stated about it here is stated upon the authority of Judge Barnard himself, of whom I thought it my duty to make inquiry.

It is shameful to be obliged to discuss such details, but the reader will perceive that the discussion has been made necessary by the charges, insinuations, and surmises that

have been made respecting this order. To be sure, the insinuations have not been very consistent. It has been suggested that the order was signed at a certain house, in order to give color to the charge that Judge Barnard was "the favorite judge of these litigants." Again, it has been darkly insinuated that there is a mystery about this order; that it never was signed at all; in order to give color to the charge that the attorneys falsely pretended that a receivership had been granted. Having seen the original order, and knowing Judge Barnard's signature, I may expect at least to be considered as having put an end to *this* part of the insinuations; and having been informed by Judge Barnard that it was signed in no improper place, and was not signed at the house supposed, I may be thought to have disposed of another part of these imputations.[1]

It has also been said that four of the directors who signed the consent to this order—North, Herrick, Wilber, and Leonard—violated the injunction of Judge Clute, which had restrained them from acting as directors. This is true. But it in no way affects the validity of the order—1st. Because an act done in violation of an injunction, if otherwise valid or material, is not void or immaterial because the party doing it has exposed himself to be punished for a contempt; 2d. Because the recital of the order that it was granted on "the consent of sundry defendants," even if the consent of North, Herrick, Wilber, and Leonard, had not been given, was supported by the consent of Chase, Everts, and Courter, who were under no injunction. Moreover, the order was also granted on the facts alleged in the complaint and verified by the oath of Chase, the plaintiff, respecting the situation of the company. It was upon the same situation of the company that the Albany receivership was appointed on the next day, but with, perhaps, less propriety.

It is now necessary to follow this order to Albany, where

[1] For the benefit of readers not familiar with the practice in this city, it may be stated here that the judges of the Supreme Court in this county are by law empowered to perform such judicial acts as signing injunctions and orders wherever they are and at all hours.

it was taken by Mr. Sterling on that night, accompanied by the receivers, Fisk and Courter, for the purpose of demanding possession of the office, books, and other property of the company in that city. On the morning of the 7th of August, Mr. Sterling learned in Albany that at some time on the previous night, Judge Peckham, of the Albany Supreme Court, had signed an order making Robert H. Pruyn receiver of the road, on a complaint made by John W. Van Valkenburgh, *General Superintendent of the road*, against the corporation; and that the possession of Fisk and Courter, as receivers, who had already taken possession of the office of the company, would be resisted by force. This information was promptly communicated by Mr. Sterling to Mr. Shearman by telegraph. Rival receivers being thus appointed by the action of the Supreme Court in different counties, it necessarily became a question to be fought out by further proceedings, as to which of the opposing receivers should be first put in possession of the whole property by the process of the law. The collision of authorities was direct. There could be no solution of the difficulty, if the contending parties did not agree to put an end to it themselves, excepting that one of the courts should yield to the other, on the ground of priority of jurisdiction attached; and even this question could not be raised and solved, excepting by putting in motion, on the one side or the other, the appropriate process for enforcing the order that one or the other of the courts had made. When such process had issued to enforce either order, a proceeding in the other court to control the execution of that process, on suggested grounds of superior equity or legal right, would raise the question of priority of jurisdiction or superior right or equity, and present the propriety of vacating the receivership granted on the side of those who might seek to control the process. In no other way could the dead-lock be dissolved.[1]

Accordingly, Mr. Shearman proceeded, on the 7th of August, to make and file a supplemental complaint, in the Supreme Court in the County of New York, in the name of

[1] All applications by either party were required by law to be made in the district where the original order obtained by such party had been made.

Chase, on whose original complaint Fisk and Courter had been appointed receivers. This supplemental complaint set forth, among other things, the superior equities and rights which the plaintiff claimed for the New York receivership over the Albany receivership. It claimed, as was strictly true, that Fisk and Courter had been appointed receivers on the 6th, and that Pruyn had been appointed on the 7th. [That readers not familiar with the law of this State may understand this matter, it is proper to explain that a judge's order takes effect *instanter*, on its being signed, when signed out of court; that in the County of New York a judge out of court has power to appoint a receiver, and his order takes effect the instant that it is signed, and does not need to be filed, while in every other county a receiver cannot be appointed otherwise than by an order *in court*, which takes no effect until it is filed in the clerk's office, and this can only be done between 9 A. M. and 5 P. M. Judge Barnard's order making Fisk and Courter receivers was signed in the evening of August 6th. Judge Peckham's order making Pruyn receiver was signed on the same evening, but it was not and could not be filed in the clerk's office until 9 o'clock A. M. on the 7th.] Chase's supplemental complaint set forth the grounds on which resistance to the New York receivers by force was anticipated, and was then actually going on. It demanded judgment as prayed for in the original complaint, and further that the defendants and all other persons be enjoined from obstructing Fisk and Courter in the discharge of their duties as receivers, and that Pruyn be enjoined from acting as receiver or claiming to act, and from making any application respecting his alleged receivership, excepting to the Supreme Court in the present action; and that all the defendants be enjoined from prosecuting their actions against the company, or the plaintiff, or the New York receivers, and from commencing or prosecuting any action for the appointment of a receiver, and from making any application therefor except in the present action, and that they be required to submit all claims and alleged rights to a receivership to the Supreme Court in

the present action. The verification of this supplemental complaint was made by Mr. Shearman by an affirmation of his information and belief of what had taken place at Albany, and in a separate affidavit he gave the sources of his information respecting the organized opposition to the possession of the New York receivers, and the necessity for writs of assistance. Judge Barnard thereupon, on the 7th of August, sitting in Special Term, made an order, embracing the several injunctions as prayed for, and requiring the defendants to prosecute their claims to the receivership in the Supreme Court in the present action, and directing writs of assistance to issue forthwith to the sheriffs of the counties where the company had any property, in order to put the New York receivers in possession, and authorizing those receivers to employ any necessary force to resist all attempts to oust them from possession.

It has been said of this proceeding, *first*, that, "instead of applying to the judges in Albany, all men of high character, to control their own receiver, and to protect Fisk and Courter, if they had any legal rights in the premises, these injunctions and writs of assistance must be telegraphed for and obtained from *Judge Barnard*."[1] The insinuation couched in this remark proceeds upon an entire mistake as to what the parties to either side of this controversy about the receivership could do. Neither of them could by law apply anywhere for support of the receivership that had been granted to either side, or for control of the opposite receivership, *excepting* in the court which had made the appointment; and General Barlow's observation, *mutatis mutandis*, is just as applicable to the parties proceeding in the court at Albany as it is to the party proceeding in the court at New York. It will be seen presently that the Albany parties and their counsel understood this point perfectly.

Secondly, it has been said that Mr. Shearman had nothing but information conveyed to him by telegraph on which to apply for these injunctions and writs of assistance, and

[1] General Barlow's letter.

that he could only give to Judge Barnard his belief that this information was true. I am not prepared to admit that, when a court has appointed receivers of such a property as a railroad, by an order which took effect as soon as it was signed, and is subsequently informed by an affidavit of the plaintiff's attorney that intelligence of resistance and of an adverse claim of title has been received by telegraph or otherwise by that attorney, and the supplemental matter is duly brought forward by a supplemental bill or complaint, it is not proper for the court to act and to act promptly upon such a state of things. Open and forcible resistance to the orders of a court, whether carried on with or without the aid of another court, is a serious matter; and the only way in which the claim of the legality of such resistance could be brought to a test in this instance was to enjoin the parties offering it to submit their claims to the court whose order they were resisting, and in the mean time to support that order with the proper process of the law. That this could be done, and ought to have been done, on the information that was laid before Judge Barnard, I think most lawyers will agree; for the rule that information and belief is strictly not evidence, does not extend and ought not to extend to the issuing of process to enforce an order previously made in a cause.

On the same day, August 7th, a corresponding proceeding took place in Albany, at the instance of the Ramsey party and in support of Pruyn's receivership. This proceeding, which has been called an *omnibus* suit, was instituted by a complaint made in the names of the company and William A. Rice, a director and stockholder, as plaintiffs, against all the other directors, together with Samuel Sloan, Ossian D. Ashley, Samuel C. Thompson, David Groesbeck, Joseph Bush, C. H. Dabney, J. P. Morgan, G. H. Morgan, J. J. Goodwin, W. H. Burns (holders of controverted stock), Van Valkenburgh (the applicant for the Albany receivership), Pruyn (the Albany receiver), Fisk, Gould, and Courter (alleged conspirators against the rights and interests of the company), Phelps, the Treasurer,

and Herrick, Vice-President, as co-defendants. The purpose of this action was twofold: *first*, to draw into the exclusive adjudication of the Supreme Court in Albany County all the matters in controversy in all the other pending suits; *secondly*, to obtain immediate injunctions against the further prosecution of those suits, and against all proceedings and processes to put Fisk and Courter in possession as receivers. It is remarkable, considering how much has been said concerning injunctions granted on "information and belief," that every allegation in this complaint (excepting, perhaps, that Rice was a stockholder) was stated therein on information and belief alone; nor did the *jurat* of Rice, annexed to the complaint, give it any other force as evidence than hearsay. It is remarkable also that the charge of conspiracy, made against certain of the defendants, as a principal ground for invoking the control by the court in Albany of suits pending in New York and processes issued in those suits, was unsupported by a single affidavit.

The complaint in this Rice suit, which, for convenience, may be called the *omnibus* suit, after describing the internal organization of the corporation, proceeded to charge Gould, Fisk, Leonard, Courter, Herrick, Wilber, and Chase, as the principal instigators and plotters in a corrupt conspiracy to obtain the control and possession of the property of the plaintiff corporation in order to subserve their speculations in its stock and the stock of other railroads, and to transfer its franchises and other property to the Erie Railway Company, then wholly under the control and management of Fisk and Gould, to the great detriment and certain ruin of the plaintiff corporation and its property; that there was to be an annual election of directors on the 7th of September, and that in the event of the said conspirators not being able to secure a majority of the stock before the election, in order to carry out their design, they threatened to prevent an election by the illegal and fraudulent use of the process of the court. In support of this charge, the complaint then set out in detail the various suits that had been commenced; viz.: by Bush and Wilber (of the Church party), the Ramsey

suit in the name of the corporation against the four conspiring directors and Phelps, Van Valkenburgh's suit to obtain the appointment of Pruyn as receiver, the suit of Chase to obtain the appointment of Fisk and Courter as receivers, and the various orders and injunctions that had been respectively granted therein, all of which, on the Church side, were alleged to have been for the wrongful and fraudulent purposes of the conspiracy charged, and not for any real interest or advantage of the company or its stockholders. In respect to the Albany receivership, this complaint alleged that Pruyn was appointed by the Albany Supreme Court, *at a Special Term*, on the 6th of August, and that he "immediately took actual possession" of the office and property of the company in Albany; that Chase's action to get receivers appointed was commenced "thereafter" in pursuance of the conspiracy, and that under a paper "purporting to be an order granted at chambers in the City of New York by a justice of the Supreme Court," and "under color thereof," Fisk and Courter came to Albany on the 7th of August and attempted to take possession of the property and effects of the company forcibly, and fraudulently.[1] The

[1] Whatever may be said of this charge as a *pleading*, it was wholly incapable of being sustained in respect to the priority of the Albany receivership, either *de jure*, or *de facto;* for the Albany appointment did not take effect until the order was filed in the clerk's office, at 9 o'clock, on the morning of the 7th, and if Pruyn had, in fact, taken any possession of the office of the company before that time, such possession could not avail any thing against the order of Judge Barnard, appointing Fisk and Courter receivers, which took effect on the evening of the 6th, when it was signed, and was actually in Albany and possession demanded under it before 9 o'clock on the morning of the 7th. With respect to the allegation that Judge Peckham's order, making Pruyn receiver, was made *at a Special Term*, I understand that in point of law, even if Judge Peckham did adjourn his Special Term, on the 6th, to the place and time when and where he signed the order on the evening of that day, or to any place and time at which he might be, his order could not take effect until filed in the clerk's office. In this respect, I understand there is an important difference between the powers of the judges in the County of New York and the powers of the judges in all the other counties, as above explained. Judge Barnard's order was not filed in the clerk's office, and did not need to be. Judge Peckham's order was so filed, and did need to be. No adjournment of Judge Peckham's Special Term on the 6th to the time and place where he signed the order, or to any other time or place, had been made, as I am informed.

complaint further set forth the necessity for an adjudication of all these matters and controversies *in the present action*, in order to prevent the inconvenience and mischief of a multiplicity of suits; and it further averred that Herrick, who had represented the City of Albany in the Board of Directors, was no longer a director, as he had been removed by a vote of the Common Council of that city on the 7th of August.

The complaint then prayed an adjudication of all these matters and controversies so described, in the Supreme Court in Albany County, in the present action, a removal from office of the directors who were parties to the alleged conspiracy, a stay of all the other proceedings, an adjudication of the titles of the claiming receivers, injunctions against Fisk and Gould to restrain them from acting or claiming to act as receivers, a confirmation of Pruyn as receiver, and injunctions against the alleged conspirators to restrain them from all further acts in the premises and the prosecution of all suits, and to require them to submit all their claims to the court in the present action, and for further relief.

On the same day, August 7th, Judge Peckham signed an order to show cause on the 13th of August, at a Special Term, why all the respective prayers of the complaint should not be granted, and in the mean time, and until the decision thereon, enjoining and restraining Fisk and Courter from acting or claiming to act as receivers, and enjoining and restraining the alleged conspirators and all other persons from prosecuting any of the suits described in this complaint, and from prosecuting any other suits to effect a removal of any of the directors of the corporation, or for the procurement of a receiver, and staying all such proceedings.[1]

This injunction also contained an extraordinary prohibition, addressed to all other persons who might act in

[1] With respect to the powers of the judges in the County of New York as compared with the powers of the judges in the other counties, see Section 24 and 401 of the Code of Procedure.

concert with the defendants, or might bring actions or institute proceedings of a like nature, or intended to accomplish the objects sought to be obtained by the actions already brought by the defendants, from advising, commencing, or carrying on, or assisting to commence or carry on, any suit, petition, or proceeding, having for its object, in whole or in part, the removal or suspension of any of the directors of the company, or the procurement of a receiver of its property, and from continuing, or helping to continue, any such proceeding already commenced. Much comment has been made upon the fact that the injunction in Chase's suit, granted on the same day, had restrained the defendants in that suit from taking any proceedings for the appointment of a receiver excepting in that action; but the injunction granted at Albany by Judge Peckham went much further than this, and forbade any application anywhere.

At the time of the service of this order, on the 7th of August, Harris Parr, Sheriff of the County of Albany, had in his hands a copy of the writ of assistance granted by Judge Barnard on that day, which copy had been telegraphed by Mr. Shearman from the City of New York. Much comment has been made upon the fact that this writ of assistance was *telegraphed* to Albany. I can perceive no impropriety in sending to a sheriff or other executive officer a telegraphic copy of legal process, in order that he may be prepared to execute the precept as soon as the original is received. Indeed, it is not an uncommon practice for officers to execute telegraphic copies of process. Of course, in so doing, they take the risks of acting before they receive the original, and the practice is liable to abuses. But it is not necessary to justify Mr. Shearman on any such ground. In fact, what he did was to telegraph to his associate counsel that a writ of assistance had been granted, and that the original was on the way. Upon their request he telegraphed to them a copy of the writ, giving no directions for its use. The sheriff, in fact, did nothing more with the telegraphic copy than to inform the opposite party that he had received it. But when the original came, he prepared to exe-

cute it. In the mean time, Pruyn, the Albany receiver, commenced a suit in the Supreme Court in Albany County, against the sheriff and his deputies, to restrain them from executing this copy, and from executing the original when it should be received. In the complaint it was expressly alleged that the sheriff had not executed the copy, but it was averred that the original would be furnished to him in a short time, and that he might undertake to execute *that.* As the ground for restraining the execution of the original, it was averred that no writ of assistance could be lawfully issued before judgment in the action, and therefore that this original, if it had been issued, was "utterly void." On this ground, expressly recited in the injunction, the Recorder of the City of Albany, exercising the powers of a judge of the Supreme Court at chambers, signed an order on the 9th of August, which enjoined the sheriff, etc., from executing this writ, copy, or original, or any other writ issued before judgment in the action of which it might be entitled.

The eagerness and celerity evinced in these proceedings suggest an amusing inquiry, why the mistakes of the Albany gentlemen of the profession should not be visited with the reproach that has been so lavishly bestowed upon some of their brethren in this city. Their attitude in regard to the validity and authority of this writ of assistance was clearly wrong, if I read the code rightly, which expressly authorizes a court, *whenever* it has ordered the delivery of property, and the order is disobeyed, to make an order *requiring* the sheriff to take the property and *deliver* it in conformity with the previous order.[1] This provision is contained in the very section in which the courts are authorized to appoint receivers *before judgment.* And the same power belongs to any court of equity, when it has made an interlocutory order which is resisted. But what would the gentlemen of my profession in Albany think of me, if, because they had made an allegation in a pleading which seems to me to have been untenable in point of law, and had obtained an injunction

[1] Code of Practice, § 244.

according to it, I should charge them with gross professional misconduct?

It is time now to state with precision what, if any thing, Mr. David Dudley Field had to do personally with any of these proceedings up to the time at which we are now arrived; not that I propose to separate his vindication from that of his partners or his colleagues, none of whom, in my opinion, need any other vindication than a clear statement of their acts, but because an exact history of this matter is important. Mr. Field was at his country place in Stockbridge, Mass., 150 miles away from New York, from the 30th of July to the 9th of August. He knew nothing whatever about any of these proceedings, and had not been consulted about them. On the 9th, Monday, he was telegraphed to and requested to go to Albany. He arrived there on the evening of that day, and then for the first time learned the state of things in regard to the two receiverships. He found his partner, Mr. Sterling, acting as attorney, and Judge Amasa J. Parker and Mr. John Ganson acting as counsel for the New York receivers, and he immediately joined them.

On his arrival at Albany, Mr. Field learned that all parties on all sides were now effectually restrained, by the injunctions and counter-injunctions issued, from further prosecution of the claims of their respective receivers in the courts, and that the Sheriff of Albany County was restrained from executing the writ of assistance which he had received. But he also learned that the New York receivers were in actual possession of the Binghamton end of the road, that the Albany receiver was in actual possession of the Albany end, that the two parties had been for some time approaching each other on the line of the road, and that Judge Barnard's writs of assistance were in the hands of the sheriffs of some of the counties on the line. It is unnecessary to recount here what had taken place on the line of the road. The danger of collision was imminent, and the population along the road were in some degree involved in the excitement. Moreover, in the City of Albany itself, there was

danger that the peace would be broken, for Courter had been forcibly ejected from the office of the company that evening. It would be nearly a week before even the Albany Court, under the order made in the *omnibus* suit, could adjudicate the title of the rival receivers, or even hear an argument upon it. Mr. Field saw that a step must be taken at once, to secure the intervention of the Governor for the preservation of the peace. Instead of promoting any action under the writ of assistance, which so far as Albany County was concerned was already stayed, and instead of doing or advising any forcible step whatever in assertion of the claims of Fisk and Courter, Mr. Field immediately desired one of the Governor's clerks to communicate with the Governor who was absent from the City of Albany, and at or near West Point, and request him to intervene for the preservation of the peace. This was done, and Governor Hoffman reached Albany the next evening, the 10th. On the 11th, early in the morning, in the Executive Chamber, the respective receivers, attended by their counsel, signed a letter addressed to the Governor, informing him that in consequence of certain judicial proceedings and conflict of jurisdictions, it had become impracticable to run and operate this road, either under the management of its directors, or the control of the persons claiming to be receivers; and as contending claimants to the possession of the road, they requested the Governor to appoint some suitable person as superintendent, to operate the road under the Governor's directions and during his pleasure, or until the necessity should cease; this appointment and possession not to affect the legal rights or present actual possession of the parties respectively to any part of the road, its offices or property. The Governor was also requested to employ such financial or other agents as he might require, and to fix their compensation.

Mr. Field informs me that his idea in advising this arrangement was, that the Governor should exercise a civil power in taking and holding this temporary possession; but in consequence of the disturbances and excitements on the

line of the road, the Governor deemed it necessary to take a *quasi* military possession, by appointing a member of his military staff, Colonel Banks, executive financial agent to run and operate the road. Colonel Banks thereupon took charge of the road; but the books of the company had been previously removed from its office in Albany to some place of secrecy, where Phelps, the Treasurer, had access to them, and continued to make entries in them. This removal took place on the night of August 5th. The books were not returned to the office of the company until the night of the 6th of September.

Mr. Field remained in Albany until the evening of the 11th of August, when he came down to New York, where he stayed until the evening of the 12th, when he returned to Albany. On the 13th he went to West Point, at the request of Governor Hoffman, to confer with the latter on the subject of funds to be supplied to Colonel Banks as financial agent of the road. He met the Governor at West Point on the evening of the 13th, and then went back to Hudson; and from thence, on the morning of the 14th, he reached his home in Stockbridge, where he remained during the greater part of the month. He was in New York only three days and a half during the whole month, viz., the 20th, part of the 21st, the 24th, and the 25th.

But there was an occurrence on the 14th of August which has formed one of the principal topics in the charges that have been made against Mr. Field. He has been charged with complicity in a fraudulent scheme to wrest from some of the holders of stock of this company, by the abuse of legal process, a large number of shares, with intent to have them used at the election in casting votes for the Church ticket of directors. I do not forget that a judge of the Supreme Court, in Monroe County, sitting at Special Term (Judge E. Darwin Smith), has declared himself satisfied that such a wrongful scheme existed, although he has in no way implicated Mr. Field in a conscious purpose to promote it. It is proper, however, to say, that an appeal from Judge Smith's decision in "The People

vs. The Albany & Susquehanna Railroad Company," and others, is now pending, which involves all his findings of fact and conclusions of law. For this reason I should refrain from expressing any opinion on the question whether there was any such fraudulent purpose on the part of anybody in the transaction about to be described, if it had not been charged publicly that Mr. Field consciously promoted that purpose, in such a way as to make it necessary for me to examine and weigh the facts in reference to its probable existence. It has been observed in a somewhat triumphant, and, as it seems to me, hasty manner, and very erroneously, that Mr. Field, in his published explanation of this matter, has "perverted the truth." [1] I shall endeavor not to "pervert the truth," either of fact or of law; nor shall I impute any such *intentional* perversion to others. But I cannot help observing that in this, as in every other inquiry into men's motives or purposes, a full and correct statement of the facts is essential; that I have not seen a full and correct statement in any of the publications which have imputed impropriety to Mr. Field, nor do I find it in Judge Smith's opinion, which has imputed a fraudulent purpose to some of those for whom Mr. Field is said to have acted. I have been obliged, therefore, to examine all the material facts for myself, and to present to the consideration of the reader what seem to me to be the true aspects of both the legal and the moral questions arising upon this transaction. In this examination I have had before me all the legal proceedings that took place, all the evidence that has been taken under oath in regard to this transaction, together with information not embraced in those sources, but which I have endeavored carefully to verify. I have also attentively perused the opinion of Judge Smith, which, so far as a judicial finding ought to influence one, might be expected to produce a bias toward his conclusions on the collateral topic of the existence of a wrongful intent to obtain possession of this stock for the purpose of voting upon it at the election.

But before I enter upon this examination, it is proper to

[1] General Barlow's letter.

repeat that Mr. Field was not in New York at the time, and that he knew nothing of any purpose to have a receivership of the stock in question obtained. Whatever blame should rest upon any lawyer, rests upon his partner, Mr. Shearman, though none in my opinion belongs to anybody.

I now come, therefore, to this topic about which there has been a great deal of comment; namely, the FULLER RECEIVERSHIP of the stock claimed by Groesbeck and others. On the 2d of August, Joseph Bush had instituted a suit in the Supreme Court in the County of New York against the company and the directors, in which an injunction had been granted on Saturday, the 31st of July, after business hours, but which was not served until Monday, August 2d. In the complaint, the plaintiff described himself as a stockholder bringing the suit in his own behalf, and in behalf of all the other stockholders, to obtain certain relief. The part of the relief sought which it is necessary to notice here, is the relief which was granted, on the 14th of August, by the appointment of a receiver, and which was obtained by the receiver's demand and possession of certificates. The complaint alleged that certain of the defendants, Groesbeck and others, held a large amount of the stock of the company, which had been issued to them by Ramsey, the President, as full-paid stock, at some time in 1868–'69; that the company had never received therefor more than 25 per cent. of the par value, and that the issue was therefore unlawful and void. In point of fact, a portion of this stock of which the receiver demanded and obtained possession of the certificates, and *on which he afterward voted at the election of directors* (3,000 shares), was forfeited stock belonging to the company, but which had been reissued to the parties who held it at the time this suit was brought by Bush. Among other prayers, the complaint prayed that the *issue* of this stock be declared unauthorized and void, and set aside, and that the stock be given up to be cancelled, and for a receiver. On the 14th of August, at a Special Term, Judge Barnard granted a provisional order, appointing W. J. A. Fuller receiver of 3,000 shares of the stock thus held by the sev-

eral defendants, and authorizing him to take immediate possession thereof, and directing the present holders of these shares to show cause before him, at a Special Term to be held in the City of New York on the 19th of August, why this order should not stand and such further order be made in the premises as might be just, and in the mean time that all proceedings on the part of the defendants be stayed.[1]

Was this an order proper to be made? There are two provisions of the Code of Practice which are applicable to this order. By § 244, subdivision 1, "a receiver may be appointed, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of the adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired." I take it to be clear that this provision is not confined to cases where a legal title to property is established or shown. The term "apparent right to property" must be held to include all equitable interests as well as legal titles. The "property," in this case, consisted of the legal title and all the equitable interests in certain shares of the capital stock of a corporation. The plaintiff, acting for himself as a stockholder and for all the other stockholders, "established," by his sworn complaint, an "apparent right" of the corporation to three-quarters of this "property," by showing that the holders of the shares to whom they had been issued had not paid to the corporation more than 25 per cent. of the par value, and that, without payment in full of the par value, the corporation was entitled to have the stock delivered up and cancelled, as an illegal and void issue. Now the question whether the *certificates* were *void*, or whether the *issue* was *void*, would be for trial after an answer; and the judgment

[1] For their appearance, see *post*. It has been stated that Mr. Fuller was an ex-clerk of Mr. Field's. He left Mr. Field's office twelve years before this occurrence, and has been largely engaged in practice since as a well-known member of the bar. I am informed that during twelve years he had had no business connection with Mr. Field's office.

to be rendered would be, whether the certificates should be given up to be cancelled, and on what terms, or be retained by the defendants, and on what terms. But before judgment on this question, it was clear, if the allegations of the complaint were believed by the judge, that the corporation or whole body of the stockholders, who in contemplation of law were the plaintiffs, had an "apparent right" in these shares, namely, an equitable title to receive three-fourths of their par value, if the final judgment should leave them in the hands of the defendants. The question whether the issue of this stock should finally be declared unlawful and void, should not be confounded with the question whether the plaintiff Bush had established for himself and the other stockholders an "apparent right" in these shares. The first was a question to be determined on the final judgment in the suit. The last was a fact to be shown before judgment, as a foundation for the provisional remedy of a receiver. That it was shown, appears to me not to admit of any doubt. The next inquiry is, whether this "apparent right" of the stockholders in this property was in such danger of being lost or materially injured or impaired as to make the appointment of a receiver necessary to protect it. For, I take it to be the clear meaning of the Code, that a receiver is to be appointed, *when* the party asking for a receiver has shown that his *interest* in the property is in danger of being lost, or materially injured or impaired, *unless* a receiver is appointed. The *interest* of the whole body of stockholders in this case, to be regarded before final judgment, was the right of the corporation to receive three-fourths of the par value of the stock. It was manifest on the face of the facts averred in the complaint, that this stock could be transferred by the defendants to parties who would become *bona fide* holders of it for value, and who might take it purged of any infirmity in its title; so that while the corporation might have, as against the present holders, a right to demand their 75 per cent. on the stock, they could not have that right against a *bona fide* purchaser for value, who might have taken it without notice that its

original issue was unlawful.[1] If it is said that the simple injunction already issued not to transfer the stock would have protected the corporation, or the whole body of stockholders, the answer is, that the Code manifestly intended that in such a case there should be another protection by the appointment of a receiver. A simple injunction not to part with the stock could be disobeyed; if it was placed in the hands of a receiver, the corporation would be fully protected in the "apparent right" which it was the purpose of the Code to protect, by the provisional remedy of a receiver before judgment on the main issue in the case.

The other provision in the Code is subdivision 5 of § 244, which declares that a receiver may be appointed before judgment, "in such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act." Assuming, for the purpose of argument only, that the case now under consideration did not fall within subd. 1, of § 244, can there be any doubt that under the Chancery practice existing when the Code took effect the appointment of a receiver in this case would have been proper? That practice required that a receiver should be prayed for in the bill. This was done in this complaint. The existing practice allowed of a receiver, without notice to the opposite party, under peculiar circumstances demanding immediate action, to be made to appear upon the papers on which the application was made. The peculiar circumstances demanding immediate action in this case were, that without a receiver the interest of the corporation in this stock could be destroyed by those who held it, before judgment could be had; and this was apparent on the facts averred in the complaint. By the former practice, the receiver was appointed for the protection of property *pendente lite*, and the order did not assume to make a final disposition of the property without a hearing of the parties. This was exactly what was done, and all that was done, by Judge Barnard's order appointing this receiver. By the former

[1] New York and New Haven R. R. Co. *v.* Schuyler and others. 34 New York, 39.

practice, on a motion for a receiver the merits were not inquired into; the motion related only to the preservation of the property. So in this case, every thing in relation to the merits was reserved by the terms of the order, and what was done was to protect the plaintiff's interest in the property *pendente lite.*[1]

Mr. Shearman, who acted as the plaintiff's attorney in this application for a receiver, informs me that he relied on the two provisions of the Code on which I have commented above. I think that either of them authorized the appointment of a receiver; and that the question whether the issue of the stock was unlawful and void, which constituted the chief merits of the action, had nothing to do with the question whether the plaintiff had established an apparent right in the property, as it then stood, to be protected by a receiver *pendente lite.* The issue of the stock might have been unlawful and void; but until that was determined, the corporation, or whole body of stockholders, had an interest in it, and the final judgment might be that defendants keep the stock and pay 75 per cent. on it to the company, or that it be surrendered to the company on their paying the holders 25 per cent., or whatever the company had already received.

It is now to be considered whether the main allegations of this complaint respecting the apparent interest of the company in this stock, by reason of its having been reissued for a payment of not more than 25 per cent. of its par value, were duly verified for the support of the order that was made? That the plaintiff was himself a stockholder was averred positively in the complaint, and his *jurat* made this averment to be on his own knowledge. The other main allegations were averred on information and belief, and the *jurat* was made in the proper form, necessary to show that the plaintiff had sworn to his information and belief of the facts so stated. Whether it was judicially proper for the judge to regard these statements, so verified, as ground for

[1] See the authorities on the existing practice collected in Note A, on section 244 of the Code, Voorhis's edition.

the provisional remedy of a receivership, depends upon the principles and authorities to which I have referred in a previous discussion, and which need not be repeated here. It is to be remembered that this order appointing a receiver of the contested stock reserved to the defendants an opportunity to show cause against it on the 19th of August; that the possession obtained by the receiver was therefore provisional until after the expiration of that time, and that when that day had expired without any cause being shown why the order should not stand, the possession of the receiver became confirmed by operation of law, *pendente lite*, and until final judgment upon an answer.

Now, undoubtedly, if we assume that there was a conspiracy to get possession of this stock wrongfully for the purpose of voting upon it in the interest of the conspirators, and if we assume further that the attorneys who procured this order, and the receiver himself, were parties to or cognizant of that conspiracy, it is very easy to censure them. Whether those assumptions ought to be made depends upon the force of the evidence which is relied upon to show a purpose to obtain a wrongful possession of the stock, in order to vote upon it at the coming election. That evidence relates to acts and occurrences three weeks subsequent to the appointment of the receiver, with the single exception of what he is said to have done at the time he obtained some of the certificates from Groesbeck. It is said that he threatened Groesbeck with a writ of assistance if he did not deliver the certificates. This might have been done by any receiver making a demand for property of which a court had ordered him to take immediate possession, without any improper purpose, if any thing occurred which seemed to him to render it necessary to refer to the ultimate process of the law. The true question to ask, in reference to this matter, is, had such a thing occurred? Mr. Fuller has testified under oath that when he went to demand the stock of Groesbeck he took a deputy-sheriff with him; that he thinks he did not say that he had a writ of assistance, but that he told Groesbeck that if he refused to deliver the stock he would have him pun-

ished for a contempt. Had any thing occurred to render this necessary or natural? It appears from Mr. Fuller's testimony that Groesbeck hesitated about delivering the stock, for he testified that Groesbeck placed the scrip in his (Fuller's) hands three times, on a pledge that he (Fuller) would return it. This, which must have occurred, if Mr. Fuller is to be believed, before Groesbeck finally gave up the scrip, is sufficient evidence that all the threat which Mr. Fuller used was deemed by him to be necessary; and considering that Mr. Fuller was a lawyer who could inform Mr. Groesbeck of the consequences of refusal, *and that Mr. Groesbeck's counsel was present*, this occurrence does not seem of itself to indicate any improper purpose on his part. Whether Mr. Fuller's subsequent act of voting on the stock has any tendency to show that the suit in which he was appointed receiver was instituted for a wrongful purpose, I shall consider hereafter. All that I am to be understood as saying now is, that on the face of the suit itself, the complaint and its verification and the nature of the claim asserted on behalf of all the stockholders of the company to have this stock secured in the hands of a receiver, I can see no evidence of any improper purpose, or complicity in an improper purpose, on the part of the plaintiff's attorneys. What was done was exactly what would have been by any lawyer with the most honest and upright purpose of enforcing a legal right; and I suppose it can scarcely be necessary for me to say, that the presumption of a rightful purpose on the part of the attorneys and counsel ought to be carried through this whole investigation, until something arises to control and overthrow it. No amount of popular prejudice or opinion that may exist concerning some of the clients for whom they are supposed to have acted, ought to be regarded for one moment as depriving these members of the bar, in the judgment of their fellows or the public, of the benefit of that presumption. If we assume that the supposed character of a client is to be regarded as proof that what a lawyer does in his behalf was done with a wrongful intent, when the professional acts done were consistent with a rightful intent, the

capacity of the bar to fulfil its appropriate functions is at an end, and men who are reputed to be bad will be found to have no rights which any lawyer can enforce or defend.

It is now necessary to describe the material facts attending the organization of the stockholders' meeting on the 7th of September, and the results of the election, which ended in the choice of two Boards of Directors. I shall express no opinion upon the question as to which of those two boards was entitled to be considered as the lawfully-elected board, or whether there was any valid election at all, because these questions are still *sub judice*, in the appeal that has been taken to the General Term from Judge Smith's decision in the case of The People *v.* The Albany & Susquehanna Railroad, and because that case may possibly be carried to the Court of Appeals. But in respect to all the charges that have been made against Mr. Field in public prints, of complicity in a scheme to carry that election by fraud or violence, I deem myself at liberty to describe what occurred.

A very thorough judicial investigation has shown that the relative strength of the two parties among the stockholders, when they assembled, was as follows:

		Shares.
Whole number of shares then out, including the stock disputed and undisputed		29,738
Deduct Groesbeck's stock held by the receiver	3,000	
Deduct stock claimed to have been subscribed for by Ramsey and others, August 5th	9,500	12,500
Leaving of undisputed stock		17,238
The Church party held in certificates of clear undisputed stock, and proxies, not including the stock held by the receiver, and certain other parcels		9,964
Assuming that the Ramsey party held the balance of the undisputed stock, which is not probable as to the whole of it, viz		7,274
Minority of the Ramsey party on undisputed stock		2,690

These figures show that without voting on some part or the whole of the 9,500 shares of Ramsey disputed stock,

that party could not carry the election, whether the receiver voted or not on the 3,000 shares of Groesbeck stock. As the Groesbeck stock held by the receiver was supposed by the Church party to be neutralized, and not likely to be voted upon,[1] they knew that they could elect their ticket without the aid of the Fuller stock, unless the 9,500 shares of Ramsey disputed stock should be voted on and counted.

It became therefore important to the Church party to have the election presided over by inspectors who would properly discharge their duties, and on whose firmness they could rely. The inspectors who had been chosen in the previous year (1868) to act at this election of 1869, Hand, Lathrop, and Haskell, were not stockholders, as the by-laws required them to be. For this reason they were enjoined from acting by an injunction granted by Judge Clerke, of the Supreme Court in New York, at the suit of Stanton Courter, a stockholder, which injunction was served on them on the morning of the 7th, before the hour fixed for the election. Whether their displacement from office and the subsequent choice of other inspectors in their place were valid or not, in reference to the election of directors, I express no opinion, for reasons already given. But the question of a fraudulent intent on the part of those who obtained and served the injunction forbidding them to act, is involved in the charges that have been made in the public prints. The reader is now in a situation to judge of this charge, because he can see that the Ramsey party, holding a minority of the undisputed stock, held 9,500 shares of stock on which only ten per cent. had been paid, and which had been clearly issued in order to make votes at the election. If the legal advisers of the Church party saw a legal disqualification of those inspectors to act, they could advise their clients to have them enjoined, without any unfair purpose of any kind; and their purpose must be judged by the situation of the two parties to this contest, and by the steps that were taken to supply the places of the inspectors whom they caused to be removed. After having read and weighed all

[1] For reasons stated *post*.

that has been said on this subject, and after a careful examination of the evidence that has been taken upon it, I do not see any ground for imputing any wrongful purpose to those who advised this injunction. It appears to have been signed in New York by Judge Clerke on the 6th, and like other processes used by both parties, and granted on that day, it could not be served in Albany sooner than the morning of the 7th. The charge that it was kept back until that morning, is far more applicable to the Groesbeck injunction, which was obtained in Albany, but was not served until the Harris poll was opened at twelve o'clock; whereas the Courter injunction, removing the old inspectors, was served at twenty minutes past eleven o'clock. I cannot see that the latter operated as a surprise upon the Ramsey party, and prevented them from assembling promptly, because, as will hereafter appear, the Ramsey actual stockholders were all present in person or by proxy before twelve o'clock, and because they came attended by a large number of persons who were not stockholders, and who are proved to have actually voted *viva voce*, when the meeting was first called to order, either with or without proxies.[1] In like manner the Church actual stockholders were present in person or by proxy before twelve o'clock, and they came attended by persons who were not stockholders, but each of whom held a proxy before he entered the building.

On the evening of the 6th, in preparation for the meeting, the Church party had certain resolutions drawn, to be introduced at the meeting, reciting the removal of the old inspectors, and providing for the immediate choice of new ones. This step has been considered one of the proofs of a scheme for carrying the election by surprise and fraud, because, as has been said, it presupposed the service of the

[1] Mr. Ramsey was aware of the purpose of the Church party to enjoin the old inspectors as early as ten o'clock on that morning, and then conversed with his counsel on the necessity for having a stockholders' meeting to appoint new inspectors, in case the old ones should be enjoined. See his testimony, pages 202, 203, folios 909, 910, in the case of the People *vs.* the Albany & Susquehanna Railroad Company.

injunction at the proper time to effect a surprise. It seems to me to have been a natural step, on the part of those who knew that the injunction would be served on the next day before twelve o'clock, to make preparation for supplying the expected vacancies in a regular and orderly manner, so that proper minutes of the new appointment could be preserved, if a trial of its legality should afterward become necessary; and as I cannot see any proofs that any stockholder in the Ramsey interest was kept away by the supposition that the old inspectors were to act, I do not see any reason for imputing to the Church party a fraudulent intent, because they prepared resolutions in advance for the purpose of giving all the legal certainty they could give to the new appointment.

On the same evening, the 6th, it became apparent, inasmuch as a new appointment of inspectors would become necessary, that, at the preliminary organization of the meeting, votes would have to be taken without a stock-list, *viva voce*, and to be decided according to the numbers of persons present and voting on each side. All the stock held by the Church party was known to them, and was held in certificates or proxies. The same was the case with the Ramsey party. If, in a *viva voce* vote taken in the preliminary organization, persons should vote on either side without being holders of either certificates or proxies, the other side would be outnumbered by mere intruders. To prevent this effect on the Church stockholders, the Church party were advised that proxies should be given to a sufficient number of persons to make the proportions of numbers correspond to the proportions of stock on the two sides, and they were particularly cautioned against giving a proxy to any but a perfectly unexceptionable person. It has been said that the men whom Mr. Fisk brought there were "roughs," which I understand to mean, in common parlance, fighting-men, whose vocation it is to put their physical force at the disposal of any man who wants such services; that they were brought there to overawe the meeting, and that by their presence they excluded a large portion of the stockholders

from access to the room, and precluded them from an open, free, and fair participation in the proceedings. The numbers of these persons will be stated hereafter. At present, it seems proper to say that I think the fair result of the sworn testimony is, that some of them were conductors and other agents of the Erie Railway, and that some of them were laboring-men in the employment of that company; that although some of them did not wear good coats, and some were in their shirt-sleeves (it was very hot weather), none of them were men who could be justly classed as "roughs," if I understand rightly the meaning of that term; that their conduct in the room was decent and orderly, and that no stockholder, and no person representing a stockholder, was excluded by their presence or prevented from a full, free, and open participation in the proceedings. The instructions were to have each of the persons furnished with a genuine proxy before he should enter the building; the proxies were distributed to them on each block of the stock represented, so that no one of them, in giving a *viva voce* vote, would represent less or more than the stock owned by the person whom he represented; and I am informed that these instructions were fully carried out.

The rooms in which the meeting took place were on the second floor of the building, the hall being in the centre, and the rooms being on three sides of the hall. The rooms on that floor were respectively the Superintendent's Room, the Library, the Directors' Room, the President's Room, and the Treasurer's Room. Commencing in the southwest corner (the Superintendent's Room) and passing round, the different rooms were connected together, in the order above named, by doors, and each had a door opening into the hall. The President's Room was between the Directors' Room and the Treasurer's Room. In these three last-mentioned rooms, and the hall, all the business of both meetings was transacted. The persons who came to take part in the election, or to be present at it, first assembled in the Directors' Room. I have found no difficulty in ascertaining from the evidence, with approximate certainty, the numbers of per-

sons present in this room at fifteen minutes before twelve, when the first meeting was called to order, and a Chairman and Secretary were chosen, and I think the evidence shows of which party these persons were adherents. The room was *capable* of holding from one hundred and three to one hundred and fifty persons; I assume the largest number as the *capacity* of the room.[1] Of the Church party there were present Leonard, Chase, Wilber, C. Courter, North, Everts, Fisk, Church, Stanton Courter, Harris, Bush, and Oliver, holding among them certificates or proxies for 9,964 undisputed shares. Besides these twelve persons, there were present as counsel Messrs. Field, Parker, Shearman, and Redfield, advisers of the Church party.

Of the Ramsey party there were present Ramsey, Hendrick, Rice, Perry, Dawson, Blackall, McCormick, Clark, Harder, and Westover, holding among them certificates or proxies for 7,274 shares of undisputed stock and 9,500 shares of the Ramsey disputed stock. Besides these ten persons, there were present on their side as counsel, Messrs. W. F. Allen, Porter, Vanderpoel, Charles Tracy, Hand, Smith, Peckham, Jr., Hale, MacFarland, Moak, and Swartz. Mr. Fuller, the receiver of the 3,000 shares of Groesbeck stock, and Mr. Groesbeck, claimant of that stock, were also present.

Including Fuller and Groesbeck, the whole number of persons present, whose names were afterward proved, was 40; 17 being on the Church side and 21 being on the Ramsey, if we exclude from either side Fuller and Groesbeck.

[1] Mr. Herrick, the Vice-President, computed the superficial area of the room at three hundred and nine square feet. Allow three square feet to a person, this would give a capacity of one hundred and three persons; but Van Valkenburg, the Superintendent, estimated the capacity of the room to be from one hundred and twenty-five to one hundred and fifty persons. I therefore assume the larger number. The door of the library, which could hold forty-four persons, was open, and, if there was any crowding, the crowd could overflow into that room. Colonel Banks, the Governor's agent, then managing the road, gave special directions and notice that the stockholders were to assemble in the Directors' Room, and that the voting for directors should take place in the Treasurer's Room. At the suggestion of Mr. Field, a strong body of the Albany police were present to preserve order.

It has been asserted that the Church party also brought in from 50 to 60 unknown men. If we assume that they brought 55, there would be only 72 persons present in the Church interest, which would leave space for 122 on the Ramsey side, supposing that both the Directors' Room and the library were filled. But the evidence does not warrant the belief that the Church party had more than 25 to 30 persons present beyond those named. Assuming the largest number which the evidence shows, there were 47 in all present on the Church side, and all holding proxies or certificates. If, then, there was a crowded state of the room, occasioned by the presence of a large number of persons not being either stockholders or holders of proxies, that crowd was not caused by the Church party, and was not there in their interest. If we assume that the crowd filled both rooms to their greatest capacity, then there were present about 124 unnamed persons not in the interest of the Church party. If we assume that only the Directors' Room was fully occupied, there were present about 80 unnamed persons not in the interest of the Church party.

These results, which I find on examination of the evidence, have satisfied me—1st. That no stockholder was excluded from the room by reason of its preoccupation by the Church party with persons who had no right to be there, or by a crowd occasioned by the Church party; 2d. That the crowded state of the room, if it was crowded, must have been produced far more by the presence of men brought there in the Ramsey interest. I think, also, that the evidence clearly shows that the unnamed persons who attended in the Church interest occupied the eastern end of the room, and that the unnamed persons who attended in the Ramsey interest occupied the western end; that, so far as there was any disorder or improper language of any kind, it was in the western end of the room; that the unnamed persons who stood at that end were mostly working-men, *employés* of the Albany & Susquehanna Railroad, with a sprinkling among them of men of Albany of the lowest class, some of whom were recognized; and that there were men in the

hall armed with clubs, who were known to be in the employment of the road. Outside of the building stood a large crowd of similar persons from the neighborhood, who were certainly not brought there by any sympathy with the Church party.

There is another test that may be applied by figures to ascertain the relative *numerical* strength or *physical* force of the two parties. At both polls, 74 persons voted, 35 at the Harris poll, 39 at the other poll; 60 ballots were cast for the Church ticket, 190 for the Ramsey ticket. So that when the voting took place, the numbers of persons voting on the Ramsey side, not in their own right but under proxies, must have greatly exceeded those so voting on the Church side at the Harris poll.

To return to the time at which the assembly in the Directors' Room were first called to order. This was at 10 or 15 minutes before 12; at that time Colonel North called the meeting to order as a stockholders' meeting, nominated Mr. Church as Chairman, and he was elected by a *viva voce* vote, without any negatives. In like manner, Mr. Herrick was chosen Secretary. Colonel North then moved resolutions, the first of them declaring the offices of inspectors vacant. When the vote on this resolution was taken, there was a heavy negative vote given at the western end of the room; but the resolution was declared to be carried. A resolution was then moved, appointing Mr. Harris, Mr. Bush, and Mr. Oliver inspectors, and was declared to be carried by the ayes. Harris, Bush, and Oliver, then proceeded through the President's Room to the door of the Treasurer's Room which was closed. It was opened by a policeman; who, on an explanation that they came to open a poll as inspectors, was directed by Mr. Banks or Mr. McQuade (agents of Governor Hoffman in the management of the road) to admit them. They proceeded to make preparations to open the poll. They were followed into the room by several of the gentlemen in the Ramsey interest, including some of the counsel on that side, Mr. Groesbeck and Mr. Ramsey himself. Either at four minutes before 12, or precisely at 12 watches

differed), the Groesbeck injunction was served on them.[1] A copy of it was handed by Mr. Harris to Mr. Shearman. Mr. Shearman went back into the Directors' Room, found Mr. Fuller, explained to him that this injunction had been served, and told him that he had better vote.[2] Mr. Fuller came into the Directors' Room, and approached the polling-place, just after Mr. Harris had proclaimed that as inspectors appointed at a stockholders' meeting in the Directors' Room, he and Bush and Oliver now formally opened a poll for the choice of directors. Mr. Fuller then took out the papers showing his appointment as receiver of the Groesbeck stock and the certificates which he held, and handed them to Mr. Harris. At this moment Judge Allen came up to the polling place, *and protested against proceeding with the election, because the hour of* 12 *had not arrived*, pointing to the clock in the room. The clock in the room showed two minutes before 12; Mr. Harris's watch showed two minutes after 12. Mr. Harris then told Judge Allen that the inspectors would not receive any ballots until the hands of the clock indicated 12 precisely.[3] The remaining two minutes were occupied by Mr. Harris in examining Mr. Fuller's papers. When the hand of the clock had arrived at 12 precisely, Mr. Harris received Mr. Fuller's votes on the 3,000 shares held by him, and then proceeded to vote himself on 9,000 shares for which he held proxies. After this the voting at the Harris poll went on briskly, until about 15 minutes past 12, when Mr. Vanderpoel, one of the counsel in the Ramsey interest, came up to the desk, and read aloud an injunction, issued from the Supreme Court by the Albany County Judge on that day, on the complaint of Minard Harder, forbidding Hand, Lathrop, and Haskell, inspectors of election, and "John Doe, Richard Roe, and James Jack-

[1] For an account of this injunction, see *post*.

[2] For a precise account of what Mr. Shearman said to the receiver, see *post*.

[3] The clock was said to have been regulated by the time at the Albany Observatory; but as I am not considering the question whether these proceedings were strictly regular, I attach no importance to the precise moment of these various occurrences. The order in which they occurred, and what occurred, are alone material here.

son," *or any other persons, that might be appointed inspectors*, from holding any election of directors or receiving any votes that might be cast at any attempted election. Mr. Vanderpoel explained that Mr. Harris was the "John Doe" of this injunction, Mr. Bush was the "Richard Roe," and Mr. Oliver was the "James Jackson." Thereupon voting at the Harris poll ceased for the space of 10 or 15 minutes.

In the mean time another stockholders' meeting had been organized in the Ramsey interest *in the hall.* Mr. Smith, who called this meeting to order, has made an affidavit that he did so at precisely 12 o'clock; and it is also in evidence that he said at the time, in the hall: "The hour for which this meeting was called having arrived, I now call this meeting to order."

At this meeting Messrs. Snow, Eddy, and Harder, were appointed inspectors of the election. They proceeded into the Treasurer's Room, passed inside the railing within which the other inspectors, Harris, Bush, and Oliver, were holding a poll, and at 23 minutes past 12, announced that they then opened a poll for the choice of directors of the Albany & Susquehanna Railroad. It does not appear, from any thing that I have seen, whether these gentlemen did or did not regard themselves as the John Doe, Richard Roe, and James Jackson, of Judge Clute's injunction, which had forbidden any persons that might be appointed inspectors from acting as such until the further order of the court, although one of them, Harder, was the injunction plaintiff. They proceeded to receive votes, and voting then went on at both polls with the following result:

> At the Harris poll, the Church ticket received 13,400 votes.
> At the Snow poll, the Ramsey ticket received 10,742 votes.

Two other injunctions need to be mentioned, which had relation to the 9,500 shares of stock that had been issued by Mr. Ramsey on the 5th of August, and on which votes were cast at the Snow poll. By an injunction issued by Judge Barnard, at the instance of Jay Gould, on the 3d of September, upon a complaint, sufficiently verified for this pur-

pose, the holders of those 9,500 shares were prohibited from voting upon them at the election of directors. Judge Clerke had also granted an injunction in Courter's suit making the same prohibition. By a counter-injunction issued by Judge Clute, the Albany County judge, on the 6th of September, at the instance of John Eddy, on a complaint not sufficiently verified for this purpose, the inspectors were prohibited from receiving any votes from the whole Church party of stockholders, *unless* the holders of those 9,500 shares should first have had an opportunity to vote upon them.

There were also three suits instituted in the Ramsey interest, having relation to the votes expected to be given for the Church side on the town stock of the towns of Oneonta, Milford, Maryland, Cobleskill, and Unadilla, in which injunctions were obtained to prevent the stock of these towns from being voted on. There was also another suit, being the sixth injunction served at the election in the Ramsey interest, to prevent any election.

No other facts attending the election need to be mentioned here, excepting those relating to Mr. Fuller's voting on the Groesbeck stock, and the arrest of Ramsey, Phelps, and Smith, which I have reserved for special consideration.

It will be remembered that on the 7th of August Judge Peckham had granted an injunction which effectually restrained all the Church directors, Fisk and Courter, claimants of a receivership, and all other parties in the same interest, from taking any steps or doing any acts in relation to the affairs of this corporation, excepting in the suit in which the injunction was granted, which was pending in the Supreme Court in Albany County, and which has been called the *omnibus* suit. When this injunction was issued, the books of the corporation had been clandestinely removed from its office in Albany, and the Church directors, a majority of the whole board, were, by the effect of the injunction, absolutely inhibited from taking any legal measures to reach them. The impropriety of this state of things was so manifest that, on the 31st of August, Judge Hogeboom,

on a motion argued by Mr. Field and Judge Amasa J. Parker for the defendants, modified Judge Peckham's injunction so far as to allow the injunction defendants to institute a suit to compel the production of the books and their restoration to the office of the company. Without them, the Church directors and the stockholders, who concurred in their views and measures, could have no means of knowing what stock had been issued, and no means of protecting themselves against votes on stock that might have been wrongfully issued, or against votes cast by unauthorized persons. They appear to have been in the position of parties who had to carry on a defensive contest against adversaries who had every means in their hands for active aggression, by the creation of votes which would be of doubtful legality or of clear illegality. But when Judge Peckham's injunction had been modified, the Church directors were free to protect themselves, so far as they could do so by obtaining access to the books. They endeavored to trace them, and did trace them to the house of Mr. Henry Smith, where they remained for several days, and then were taken away. They supposed at one time that they had been removed to Pittsfield in Massachusetts, and, following there the clew which they had discovered, their agents endeavored to reach the books by a writ of replevin, but without any success. Baffled in all directions in this search, the Executive Committee had to consider whether there was any legal proceeding which they could institute against the persons who were believed to have the books under their control, that would compel their production or restoration to the office of the company. The election was now less than a week distant. The person who went to Pittsfield in pursuit of the books, and who found evidence that they then were or had been there, and that they had probably been brought there by Van Valkenburgh, the Superintendent, for Pruyn, who had left the State, returned to Albany on the 2d of September. Further fruitless search was made in Albany, which consumed a part of the time remaining between that date and the day of the election. It appears to me that great diligence was used, and that it

was not until the 6th of September that any legal proceedings could be taken. On that day, by authority of the Executive Committee of the directors, and of Herrick the Vice-President,[1] a suit was commenced in the Supreme Court in New York, in the name of the corporation, against Ramsey, Phelps, Pruyn, and Smith (the latter being one of the counsel of Pruyn the Albany receiver), charging them with the abstraction and concealment of the books, and withholding them from the inspection of stockholders, and laying the damages at $50,000. This action was commenced under § 179 of the Code of Procedure, which authorizes a personal arrest in such cases. On the same day Judge Barnard granted an order authorizing the arrest of the several defendants, and requiring the Sheriff of Albany County to hold each of them to bail in the sum of $25,000. This order of arrest was placed in the hands of the Sheriff of Albany on the morning of the 7th of September. On the night of the 6th the books were secretly returned to the office of the company, being drawn up in a basket to a window in the rear of the building by Phelps and Mr. Ramsey's son. But their return was unknown to any of the Church

[1] The authority to commence the suit was embraced in the following resolutions, which are here taken from the minutes of the Executive Committee:

"At a meeting of the Executive Committee of the Board of Directors of the Albany & Susquehanna Railroad Company, held at the city of Albany on the 3d day of September, 1869.

"Present, Azro Chase, David Wilber, and Jacob Leonard.

"*Whereas*, certain books of this company, two stock-ledgers, two transfer-books, book of stock certificates, cash-book, book of minutes, and two subscription-books, have been abstracted from the office of this company by Joseph H. Ramsey, William L. M. Phelps, Robert H. Pruyn, and Henry Smith, acting in concert with others, and it is important that said books should be recovered and restored to the office of the company: therefore

"*Resolved*, That Field & Shearman be employed as counsel to take all legal means for the recovery and restoration of the said books, and for the arrest and punishment of the persons abstracting them, with liberty to employ associate counsel as they may find it expedient; and further

"*Resolved*, That the books, as soon as recovered, be deposited in the office of this company, to be there kept with the other books of the company.

(Endorsed.)

"The within resolution was this day passed at a meeting of the Executive Committee, all being present excepting Messrs. Ramsey and Rice.

"Dated September 3, 1869.

"Azro Chase,
"David Wilber,
"Jacob Leonard."

directors or their counsel or attorneys, either in Albany or New York.

It has been charged that this order of arrest was obtained for the purpose of preventing Ramsey and the other defendants from participating in the election, by seizing their persons; and among other proofs of this purpose, the alleged exorbitant amount of bail required has been pointed to. The amount of bail, considering the wrongful acts charged in the complaint, does not appear to have been excessive in itself; and it is only by applying it to the hypothesis of an oppressive and fraudulent purpose in making any arrest, that it can be regarded as excessive. It was an amount of bail which men in the positions of the defendants could and did easily procure as soon as they were required to do so. With respect to the time and other circumstances of the actual arrest, I shall consider hereafter what tendency they have to establish the charge of a fraudulent intent. At present, it is enough to say that all correct reasoning on such a subject must involve the inquiry whether there was not, on the part of the Executive Committee who authorized and the counsel and attorneys who conducted this proceeding, another purpose, of an entirely legitimate and proper character, with which all their acts in regard to it are more consistent than they are with a wrongful purpose.

I am informed that the expectation with which this order of arrest was obtained, was that it would compel the production of the books; and that no other use was ever intended to be made of it. Is this a rational supposition? To those who are predisposed to look upon every step that was taken by one of the parties to this excited contest as so many proofs of a base conspiracy to obtain the control of a railroad by fraud and against the wishes of a majority of its stockholders, nothing will seem rational that conflicts with that view of their conduct. But to those who reflect that this suit was instituted under the advice of men of mature years, great experience, and hitherto unblemished integrity—I refer to the counsel who

procured a modification of Judge Peckham's injunction—who recollect that the production of those books was essential to a fair election of directors, and that the process resorted to was one expressly authorized by law, it will not seem an irrational supposition that such men relied upon it as an effectual means of compelling the production of the books, and of securing to their clients the inspection and use of the books to which they were unquestionably entitled. There are few lawyers, I apprehend, who are accustomed to advise on such affairs, who would not regard an arrest of parties unlawfully and clandestinely concealing property to the possession of which their clients were entitled, as a legitimate and proper weapon of the law to compel the wrongdoers to make restitution, when the law itself expressly authorizes an arrest in such cases. What was and is the whole object of an arrest for debt on mesne process, when it was or now is authorized? Was it and is it not to compel payment of the debt? It surely never was, in any true theory of the law, to incarcerate the defendant as a punishment for not paying. The legitimate and proper purpose is to compel payment. In like manner, the proper purpose of an arrest on mesne process of one who is charged with a wrongful embezzlement or concealment of personal property, is not that the arrest may operate as a punishment, but it is that it may operate to compel the production of the property. In any inquiry, therefore, of an ethical nature into the motives or purposes of a lawyer who has advised such an arrest, this legitimate and proper use of legal process is not to be overlooked. A lawyer, like all other men, when a moral judgment is to be passed upon his professional acts, is entitled to demand that his acts shall be judged by applying them to the proper motive with which they might have been performed, and with which they are clearly consistent. It is as great a wrong to assume an improper motive in forming our opinions of a man's conduct, and to array the evidence only in reference to that hypothesis, as it is to pervert the evidence or to misrepresent the facts. He who would judge truly must embrace

the whole circle of rational motives, and especially he must not exclude a motive which is commonly acted upon in doing that about which he is inquiring.

Furthermore, it is worthy of consideration here, whether the wrongful purpose which has been imputed to these gentlemen is a rational supposition. How could they imagine it possible for them to arrest those parties on the eve of that election, *for the sake of preventing them from acting at the election*, without incurring a liability of a most serious character? The reader must remember that, in this investigation, we are not dealing with the characters of men who are either tyros or fools; but with men of large experience in affairs, of acknowledged forecast, of extensive professional knowledge, and of undisputed ability to discern the limits of legal and moral rectitude. To whatever extent they may be supposed to have been zealous for the interests of their clients, I am quite free to say that, according to my observation, men of their years and abilities do not commonly allow zeal for their clients to carry them into acts, and to pursue objects, which would be irrational because they could not possibly be successful, even if there were no higher restraint operating to prevent them. The election of the Church ticket of directors at that corporate meeting, could no more have been carried, so as to be valid, by arresting Mr. Ramsey and lodging him in jail until after the election had been held, with a purpose to prevent his acting, than it could have been carried and be made valid by placing a file of soldiers at the polls, with orders to shoot every man offering to vote the Ramsey ticket. And I presume that this was just as well known to the counsel who advised the bringing of the suit, as it is known now to me, and every other lawyer in the land.

With respect to any improper purpose in arresting Mr. Phelps, he was not, I understand, a stockholder, had no special duty to perform at the election, and the Church party could therefore have had no motive in preventing him from being present. As to Mr. Smith, although he was one of numerous counsel acting in the Ramsey interest, it would

be difficult to find a reason for preventing *him* from being present at the election, and at the same time leaving Judge Allen, Judge Porter, and all the other counsel who were present, to render their valuable and important services to their clients. So that, as it appears to me, the reader must commence his inquiry into the facts and circumstances attending that arrest, with an irrational hypothesis on the one side to which to apply them, and with an entirely rational hypothesis on the other side, with which the actual occurrences are perfectly consistent throughout.

The facts attending the arrest were these: The papers authorizing the suit to be brought arrived at the office of Field & Shearman, in New York, on Saturday the 4th of September, between one and two o'clock. Mr. D. D. Field had then left his office to take the train for Stockbridge. Mr. Dudley Field, his son, proceeded to draw the complaint with all dispatch, but the whole of the necessary papers could not be prepared until Monday the 6th. On that day, Mr. Morgan, of the law firm of Lowe, Clarke & Morgan was employed as counsel to obtain the order of arrest and take it to Albany. Judge Barnard was then holding the Court at chambers. Mr. Morgan proceeded to chambers, found that Judge Barnard had left for the day, followed him to his house, and there obtained the order of arrest. He then took the first train to Albany, where he arrived at about midnight. At Albany he delivered the papers for the arrest to Conway, a clerk of Mr. Hamilton Harris, with directions to deliver them to the sheriff at the earliest possible moment that morning, the 7th. Before the sheriff's office was open that morning, Conway handed the papers to the sheriff in person, at his house. The time at which the sheriff's office was opened was nine o'clock. No orders were given as to the time or place of service; but when Conway placed the papers in the hands of the sheriff, the latter asked if there were any instructions, to which Conway answered, "Only to do your duty." At the same time there was placed in the sheriff's hands a *pluries* non-bailable attachment, issued by Judge Barnard, directing him to arrest

Pruyn for an alleged contempt of one of Judge Barnard's previous orders. Pruyn was at this time out of the State, and the sheriff had heretofore been unable to find him. Without any further communication with any one concerning the service of any of these papers, the sheriff went to consult his own counsel, William J. Hadley, who was in no way connected with either of the parties to these controversies, and to obtain his advice concerning the time and mode of serving the papers that had been placed in his hands.[1] Hadley advised the sheriff to look for Pruyn at the office of the Albany & Susquehanna Railroad, as he would be likely to go there if he had returned to Albany, and that it was his (the sheriff's) duty to look for Pruyn at that place. In regard to the arrest of Ramsey, Phelps, and Smith, Mr. Hadley told the sheriff that if he should meet Ramsey and Phelps when searching for Pruyn, it would be his duty to serve the process of arrest, otherwise he would be liable for an escape, but that he should take care to have bail-bonds with him, and give them as little inconvenience as possible, *in order not to interfere with the election, or to prevent their participation in it.* The sheriff thereupon went to his office to procure bail-bonds, leaving the papers in the hands of his counsel, for further examination. Having procured the necessary blanks for taking bail, the sheriff returned to Mr. Hadley's office, and Mr. Hadley repeated to him the instructions and advice he had already given respecting the arrest of the several parties named. Some other necessary business which the sheriff had to transact that morning, and the preparations and consultations with his counsel in regard to these arrests, had occupied so much time, that it was about *half-past eleven o'clock* when the sheriff left Mr. Hadley's office to go to the office of the railroad. He was accompanied by his under-sheriff. When they arrived at the office of the company, Pruyn was

[1] It has been stated with absolute incorrectness, in the *North American Review*, that the sheriff consulted a lawyer who was "one of Mr. Fisk's numerous counsel." Mr. Hadley has made oath that he was not counsel for any of the parties, and that he had no interest or motive in advising the sheriff excepting to aid him in the discharge of his official duty. See Mr. Hadley's affidavit in the Appendix.

not there, but Ramsey, Phelps, and Smith were. The sheriff informed each of them of the process which he held; stated to them that he wished to cause them no inconvenience, and requested them to procure bail. While the bonds were preparing, they passed in and out of the room in which the sheriff met them, into the adjoining room, the sheriff using no other restraint than to desire them not to leave the building.[1] Bail was at once procured and offered. The sheriff himself had some doubt about the sureties, but Mr. Shearman, who knew their standing, requested the sheriff to accept them, in order to have them released from all restraint as speedily as possible. The bail-bond was executed for all three before the voting began.

Any extended comments on these facts seems to me wholly unnecessary. They are not reconcilable with an attempt to arrest these men and remove them from that building, in order to prevent them from taking part in the election, or to restrain them within the building until the meeting should be organized and the voting should have taken place. It has been said that "the whole proceeding certainly spoke volumes for the ingenuity and resource of those who engineered it. In its style it could not have been improved."[2] There is no ingenuity in engineering an occurrence which transpires by mere accident, as did the sheriff's first meeting with these gentlemen at the time and place

[1] Mr. Ramsey testified on the trial of the case of the People *vs.* The Albany & Susquehanna Railroad Company and others, that the sheriff would not allow him to leave the *room.* But the sheriff, on the same trial, gave a very different account of this matter, when cross-examined as follows:

Q. Do you remember the circumstances of your refusal to allow Mr. Ramsey to go out of the room while the bonds were being prepared?

A. No, sir; he went just where he had a mind to. . . . .

Q. Will you take your oath that you did not tell him not to leave the room?

A. I don't remember. I was very kind to him. I did not want to give him any inconvenience. They went about the room, in and out. Mr. Smith was the last one, and I waited at the corner of the desk, and I think that I sent away to ask if he was at leisure. . . . .

Q. When you went down to the Susquehanna offices on the day of the election, had you any intention to interfere with the election?

A. No, sir

[2] North American Review.

where he did; but there may be a great deal of a certain kind of ingenuity displayed in misstating and suppressing facts, as has been done to an extraordinary extent in the article in the *North American Review*, entitled "An Erie Raid." It is twice stated in that article that the sheriff's legal adviser was one of Mr. Fisk's counsel. The sheriff's legal adviser has sworn that he was disinterested. It is stated in the article that "the officials of the road were arrested just when they should have been organizing their meeting." None of them had any special duty to perform in organizing the stockholders' meeting; but Ramsey, who was the only stockholder among the three, had a right to be present and to vote. His presence was never for an instant interrupted. Even if no bail-bond had been signed and accepted, it is impossible, if the sheriff and his counsel are to be believed on their oaths, to imagine that Mr. Ramsey would have been prevented from voting, either in the organization of the meeting, or in the choice of directors.

From a full and careful collation of all the evidence that has been given on this subject, I am satisfied that the Reviewer has not correctly stated the facts respecting the time of the arrest; that his representations that "half an hour" was occupied in arranging the bail-bonds, that thus Mr. Shearman's "*coup* had been completely successful," because Mr. Ramsey had been kept under restraint until the polls of the Church organization "had been long open;" that Mr. Smith, in consequence of the arrest, was unable to attend to the organization of another stockholders' meeting until after "the Erie party" had so matured their plans as to feel sure that they were "in possession of the Albany and Susquehanna Railroad beyond peradventure," have given an entirely false coloring to this occurrence. A fair examination of the evidence shows, in my opinion, that the sheriff made known to Mr. Ramsey and the other defendants in the process of arrest, that he had such a process, at *ten or fifteen minutes before twelve o'clock*, which was the hour fixed for the election; that very little time was consumed in arranging the bail-bonds, in consequence of Mr.

Shearman's promptness in accepting the sureties offered; that none of the parties subjected to the technical arrest were in any way restrained in their movements through the different rooms; and that the bail-bonds were executed and the parties released from the arrest before 12 o'clock and before the voting at the "Harris poll" began. If Mr. Shearman had any "coup" to effect, by causing Mr. Ramsey, Mr. Phelps, and Mr. Smith, to be *arrested in those rooms, at the moment when their presence was most necessary*—a supposition that is entirely irreconcilable with the sworn statements of the sheriff and his counsel in their affidavits—then Mr. Shearman took the very course most likely to defeat his own object. A lawyer, who had the alleged purpose to effect, would not have promptly come forward to advise the sheriff to accept the bail offered. In my opinion, the time and place of the arrest were pure accidents, over which Mr. Shearman had no control, and for which he is under no moral responsibility; nor do I think that Mr. Field, Judge Parker, or Mr. Harris, knew, or could have known beforehand, of the sheriff's movements during that forenoon, or that any arrest was likely to be made at the time and place where it was made. In fact, among all the judicial orders that were served at that meeting, on the one side and the other, this arrest, accidentally made *there* by the sheriff, appears to have caused less real embarrassment to anybody than any other order or process that was brought there. As soon as it had been served, the defendants made known, and then for the first time, that the books were in the company's safe, to which they had been returned, secretly, on the previous night.

Again: the Reviewer has torn from its context a sentence of Mr. Shearman's testimony, and perverted it to a bearing on this arrest, to which it had no relation, in the following manner:

"The thing [the arrest] could not have been better timed. To understand the full possible effect of this move, and the spirit in which it was made, it is necessary to bear in mind a remark of Mr. Shearman in his subsequent testi-

mony: 'I didn't want to lose a second's time, because I knew the value of time in this case, and I knew that the whole question would have to depend upon the question of which meeting was organized first.' The officials of the road were, *therefore*, arrested just when they should have been organizing their meeting."

I know not whether the reader will entertain the same opinion that I do respecting such gross perversions of testimony. When they occur before a court or jury, they commonly receive the castigation they deserve. Are they less worthy of rebuke, when they are made in print for the purpose of influencing public opinion? At all events, whatever may be the disadvantages with which Truth has to "draw on his boots" in order to pursue what has gone before him, the reader will now learn that Mr. Shearman's remark had no reference whatever to this arrest, and, moreover, that his testimony has been garbled as well as misapplied. Mr. Shearman, on the trial from which this extract was taken by the Reviewer, was subjected to a severe cross-examination respecting his motives and movements on that day, in the course of which the following occurred:

"*Q.* Did you go beforehand to see Mr. Banks, and inquire which was the room where the stockholders' meeting was to be held, so that you could find it on election day? *A.* For that and other purposes.

"*Q.* Didn't you go to him to find out which room they were going to occupy, so that it could be preoccupied by those in your interest? *A.* No, sir.

"*Q.* Then tell me what motive you had? *A.* I wanted to know when I went down there which room to enter.

"*Q.* Was you afraid you could not find it? *A.* I didn't want to lose any time; I wanted to be there at the minute exactly.

"*Q.* Do you mean to say that you went there and made inquiries of Mr. Banks in reference to those rooms, for fear you wouldn't be able to find the proper rooms when you went there to the election? *A.* Yes, sir, that's it exactly.

"*Q.* And that was your only reason? *A.* Yes, sir, and for the purpose of giving information to the gentleman that was with me, and I didn't want to lose a second's time, because I knew the value of time in this case, and I knew that the whole question would have to depend upon the question of which meeting was organized first."

But it is needless to follow further in detail the misrepresentations that have been made concerning the circumstances and the purposes of this arrest. The reader will find the material facts fully set forth, in a series of affidavits annexed to this opinion, which were read by the counsel for the Church party on the hearing of a motion made in the interest of the Ramsey party in May, 1870, in the Supreme Court, in Albany County, for a discontinuance of the suit in which the arrest was ordered, *upon the ground that it was brought without due authority, and also on the ground that the Ramsey Board of Directors, after they had been put in possession, had directed its discontinuance.* The judge who heard this motion (Judge Ingalls), after the reading of affidavits on both sides, inquired whether the suit had not answered its main purpose, the books having been restored to the office of the company before the election; and upon the counsel for the plaintiffs answering in the affirmative, he ordered a discontinuance, *without any costs.* It is not true, therefore, as has been asserted, that this suit was discontinued because it had been brought without authority. The motion was made to effect not only a discontinuance, but also to compel the payment of the defendants' costs by the plaintiff's attorneys, or the Executive Committee. This the judge denied.

Among the other incidents of the election it is now necessary to examine the act of Mr. Fuller in voting on the shares which he held as receiver, and the connection of Mr. Field or Mr. Shearman with that act. It will be remembered that the charge is, that this receivership was obtained on the 14th of August, for the fraudulent purpose of voting on these shares in the interest of the Church party, at the election on the 7th of September, against the wishes of the alleged owners of the shares; and that the act of voting by the receiver, coupled with the circumstances under which he gave his vote, *proves* the original purpose of obtaining the receivership to have been fraudulent. It is, perhaps, needless to remark that the receiver's act of voting may or may not have some tendency to establish the conspiracy

charged, according to the circumstances under which the vote was given. If those circumstances make the act of voting just as consistent with a rightful as with a wrongful purpose, I suppose that very few readers will expect me to arrive at the conclusion that this receivership was part of a plot to carry the election by fraud. I take it to be as sound a rule in forming the moral judgments of every-day life, as it is in courts of law, that a base fraud is not to be imputed to any man, unless upon very clear evidence; and that when the evidence is circumstantial, it ought to have a very strong tendency to exclude the possibility of an honest purpose, before it is allowed to convict any man of a dishonest one.

The reader has seen all the material facts connected with the appointment of the receiver. He has now to follow the receiver to Albany.

Mr. Fuller has testified under oath that he went to Albany to attend the election, *at the request of no one*, although he had previously conversed with Mr. Shearman, and possibly with Mr. Field, but of that he was not clear; that neither of these gentlemen requested him to go to Albany and vote on this stock; that when he went he was undecided in his own mind about voting, but that he meant to watch the proceedings and be governed by circumstances; that his general purpose was not to vote, unless some emergency should render it necessary; that on the morning of the election in Albany he had some conversation with Mr. Shearman, and went with him to the place where the election was to be held; that he was not acting in concert with Mr. Field and Mr. Shearman; that before going to the room Mr. Shearman gave him a ticket having the names of the Church directors; and that he voted that ticket after Mr. Groesbeck's injunction had been served on the inspectors at the Harris poll, and after Mr. Shearman had advised him to vote, first exhibiting to the inspectors the papers of his appointment as receiver of the stock referred to in the injunction, together with the scrip. He testified, further, that he did not consider it his duty in voting to consult the wishes of those who claimed to own the stock, i. e., Groesbeck and others.

The poll at which Mr. Fuller voted was what was called the "Harris poll." The facts attending the organization of the meeting have been already detailed. The facts show that the Groesbeck injunction, served on the inspectors at the "Harris poll," just as they had opened their poll, forbade the receiving of any votes of the Church party, unless the "holders" of the Groesbeck stock should first have been allowed to vote on that stock. One of the copies of that injunction, which was one of the copies served, is now before me. It is a printed copy; which fact shows that previous preparation for its service at the polls had been made in advance. By its date, it purports that the original was signed on the 6th of September. At the foot it has the words and figures "Dated September 6, 1869," all of which are in print excepting the figure "6," which was inserted with a pen in a blank left for the purpose. It is morally certain, therefore, that this injunction, prepared for in advance, was not obtained until the 6th; that it was intended to be served on the 7th at the election; and it is a fact that no intimation of it was given to the Church party until the moment when it was served on the inspectors at the Harris poll. It thus created suddenly an unexpected situation, which the Church party could not have foreseen. They supposed, as I infer from the injunction which had been obtained by Bush on the 31st of July, and from the receivership which had been ordered on the 14th of August, that the Groesbeck stock (3,000 shares) was neutralized; and it was clearly unnecessary for *them* to use those shares in voting, *because* they had a majority of all the outstanding undisputed stock. It was not, therefore, until Groesbeck's injunction had been served, that it became of any importance to the Church party to have this Groesbeck stock voted on by anybody. But when that injunction had been served, a new and unexpected necessity arose for receiving votes on that stock from somebody. The votes on it were cast by the receiver.

It will thus be seen that two questions arise in regard to the act of the receiver in voting on this stock. One is, whether he could lawfully cast a vote which ought to be

counted in the election, supposing that what was called the "Harris poll" was duly and properly held. The other question is, whether Mr. Shearman, or any other lawyer, could on the spot have honestly advised Mr. Fuller to vote. The first is purely a question of law. The second is a question of professional ethics, depending, for the true elements of a moral judgment, on the inquiry whether it was so clearly illegal and improper for the receiver to vote, that no lawyer could have advised him to vote without acting from an improper motive and with an improper intent. For, I presume all impartial and intelligent lawyers and laymen will agree, that unless Mr. Shearman was bound to have seen that it was clearly unlawful for this receiver to vote, his advice to the receiver to give his vote is no evidence that Mr. Shearman was acting in pursuance of a corrupt conspiracy to carry the election fraudulently, as it is also no evidence that such a conspiracy existed.

Now I shall endeavor to state the argument both *for* and *against* the lawfulness and propriety of this receiver's voting on this stock, with equal fairness; and I begin with the reasons that may be assigned against his voting:

In the first place, it may be said that the purpose of the action in which the receiver was appointed was professedly to have the issue of the stock declared void, and the scrip delivered up to be cancelled. In the next place, it may be said that a receiver is a mere officer of the court, holding the possession of property as a trustee for a temporary purpose, and that if there are to be any acts done with or concerning the property which are to be done by virtue of the legal title, it belongs to the owner of the legal title to do those acts, rather than to a trustee who has the mere possession for a temporary and judicial purpose. In the third place, it may be said that a receiver of stock in a corporation, the lawfulness of whose issue is in contestation in a suit, cannot vote at an election of directors along with holders of stock whose right to vote is not contested, because stock so held by a receiver ought not to be considered as held for the purposes of voting, since it may be used against

the wishes of those in whose names it stands registered. Finally, it may be said that it is the duty of a receiver holding stock in a corporation situated as this stock was by the pendency of the action in which he was appointed, to apply to the court which appointed him for directions, and not to assume to vote upon the stock without an express authority from the court; and that if this receiver had so applied, there is ground for saying that no such authority would have been rightfully given, because the court does not vote at corporate meetings.

On the other hand, it must be remembered that when property is placed in the hands of a receiver by a court of equity, the party who held the legal estate at the time the possession was so transferred, is not necessarily the sole *cestui que trust.* Receivers hold in trust for all the parties having any beneficial interest in the property, while their official possession continues, and for whomsoever the final judgment shall be when their official title and possession terminate. There may be, therefore, various *cestuis que trust*, all of whose rights and equities are for the time being held by the same trustee; and I have already suggested the grounds, which seem to me very plain, on which it is to be held that the plaintiff in the suit had established for himself and all the other *bona fide* stockholders an apparent right or equitable interest in the property, according to the meaning and purpose of the Code, for the purposes of a receivership, which right or interest must be regarded as existing until final judgment on the merits of the action, *notwithstanding* the allegation of the complaint, that the issue of the stock to the defendants was unlawful and void. In regard to the question of allowing a trustee of stock to vote, instead of one or more of the *cestuis que trust*, I know of but one case that can be cited against the right of the trustee to cast the vote. It is the case of *ex parte* Holmes, 5 Cowen, 426, where the Supreme Court set aside an election of directors that had been carried by the vote of a trustee. But a proper examination of that case and of the view of it taken by Savage, Chief Justice, in

the later case *in re* Jacob Barker, 6 Wendell, 509, will show that neither of those cases touches the right of a receiver to vote, who holds stock situated as this stock was at the time of Mr. Fuller's voting. In *ex parte* Holmes, the stock belonged to the company, but was registered in the name of a trustee who held it for the company; and it was held that the trustee could not vote, not because the *cestuis que trust* was the proper party to vote, but because the whole beneficial property in the stock belonged to the company, and could be controlled by its officers the directors, who might use it to perpetuate themselves in office by requiring the trustee to vote for themselves. "All that was said in that case," said Savage, Chief Justice, "in relation to the rights of a trustee or *cestui que trust* to vote on stock standing in the name of the trustee, either generally or specially, in his representative character, was said in reference to the peculiar circumstances of that case. The court never could have doubted the right of a person to vote upon stock standing in his name, although held by him in trust for another," etc. (*In re* Jacob Barker, ut supr.) The stock held by Mr. Fuller, and on which he voted, was not registered in his name, but is a peculiar case. It stands, therefore, unaffected by *ex parte* Holmes, unless the reasons assigned in that case for not allowing the trustee to vote are also applicable to the case of this receiver. In *ex parte* Holmes the legal title was in the trustee, but the *whole* beneficial interest was in the company; and because the directors could, therefore, dictate his vote to the trustee, it was held that stock so situated must be considered as not held for the purpose of voting. But how was it with the stock held by this receiver? The *whole* beneficial interest was not in the company, and the stock stood registered in the names of Groesbeck and others, who had 25 per cent. of the beneficial interest in it, as the receiver was bound to assume on the papers in the action, and who, moreover, claimed the whole interest. How, then, could the directors of this company dictate a vote to the receiver? They could not remove him, or control him, as it was said in *ex parte*

Holmes the directors could have done with the trustee in that case. As representatives or officers of the whole body of stockholders, the directors of this company could only leave the receiver to act on his own judgment of what was required by the interests of all the *cestuis que trust*, of whom he was the representative in a much more direct and specific sense than the directors, for the plaintiff and the other stockholders were acting in reference to this stock not through the directors, but by the intervention of the court. The mischiefs, therefore, on which *ex parte* Holmes was decided, do not affect this case. The directors could not control the receiver, and no evidence exists that any party among them attempted to do so.

In regard to the supposed rule that a court of equity does not vote at corporate meetings, it obviously will not do to say that a receiver of stock is not to vote under any circumstances. Under such a rule, if the receivership happened to comprehend ninety-nine hundredths of the whole stock, there would be an election of directors by the remaining one-hundredth, and the ninety-nine hundredths would not be represented at all. No court of equity would allow of this, but it would allow and direct its receiver to vote for the protection of the interests of all whom he represents. And in regard to the necessity of an application to the court for directions to the receiver, while such is undoubtedly the general rule, may there not be circumstances in which the receiver may be obliged to act on his own discretion, before he can ask for directions, in order that there may be an election at all, or that there may be a fair election? In this case I conceive that there were such circumstances. For, the service of the injunction obtained by Groesbeck, as above stated, forbidding the inspectors to receive the votes of the whole Church party among the stockholders, unless Groesbeck and others, claimants of the 3,000 shares in controversy, and all the "holders thereof," should "*first* have had an opportunity to vote upon all the shares by *them held respectively*," placed the receiver under a species of moral duress to decide instantly two questions: *first*, whether he

had a general power to vote; and *secondly*, whether he was not to be regarded, within the terms of this injunction, as the holder of the stock, whose previous vote was the key that was to unlock the prohibition and permit the votes of the Church party to be received. A fair construction of the injunction certainly raised the question whether it was not the duty of the receiver to vote as "holder" of the 3,000 shares. Groesbeck and the other plaintiffs in the injunction were not the holders of the stock or of any part of it; for they had surrendered the scrip to a receiver, who was for all purposes the "holder" of the shares while his receivership continued. Groesbeck and the other claimants of the shares could not cast the vote upon them merely because they were a branch of the *cestuis que trust.* If they were to be voted upon at all, the vote must be cast by the receiver; and it was the clear meaning of the injunction that somebody should vote upon them, otherwise the votes of the whole Church party among the stockholders, representing 10,400 shares, would be excluded. Moreover, Mr. Groesbeck was in the room when his injunction was served at the "Harris poll." He did not claim the right to vote on the stock himself, nor did he ask the receiver to vote according to his (Groesbeck's) wishes, nor did he or any one else challenge the receiver's vote. As soon as Mr. Shearman had an opportunity to read Groesbeck's injunction, he saw the necessity for some one's voting on this stock, and acting upon a construction of the injunction of which it was certainly capable when applied to the situation of things at that moment, he said to the receiver, "An injunction has been served restraining this election from going on unless the votes upon the 2,400 shares which you hold are first received, and you had better vote." Mr. Field gave no advice to the receiver about voting, one way or the other.

It seems to me that these facts need only to be stated to relieve Mr. Shearman from all imputation of a wrongful intent. He was obliged to construe that injunction. Will it be said that he did not construe it rightly, and that it meant by "holders" of the stock no one but Groesbeck and others,

the injunction plaintiffs? If this *was* its sole meaning, which under the actual situation of things in my opinion it was not, is Mr. Shearman to be charged with an intent to carry that election by a *fraud*, because he *misconstrued* an injunction? Then why not charge Groesbeck and others with an intent to *prevent* an election by fraudulent *use* of an injunction, which they obtained without reference to the fact that the stock was in the hands of a receiver, and which they served at a moment when it would have excluded the whole of the Church votes if the receiver had not come forward and voted? The answer is, that in neither case are these charges of fraud to be lightly made, by him who would do equal and exact justice in his judgments upon the acts of these parties. But Mr. Shearman not only had to construe that injunction, he had also to apply it to the real situation, so that the clients for whom he was acting could have their votes received. There was but one way in which their votes could be received, namely, by first allowing some one to vote on the 3,000 shares held by the receiver. That the receiver was in contemplation of law the "holder" seems to be quite clear.

It has struck me very forcibly that in the long complaint of Groesbeck and others on which the Albany County judge granted this injunction, the fact that the stock claimed was in the hands of a receiver was not stated. While this complaint dealt very minutely in charges of a conspiracy, and while it informed the Supreme Court in Albany County that Bush had *prayed* for a receiver, it did not inform the court that a receiver had been appointed; and the sole information it gave was that at the instance of Bush an injunction had been granted restraining them (Groesbeck and others) from parting with the stock. But Mr. Shearman did not and could not know that Judge Clute's injunction requiring a vote to be first received on these 3,000 shares had been granted in ignorance of the fact that they were then "held" by a receiver. If he was bound to presume any thing about it, he was bound to presume that Judge Clute knew the precise situation of the stock, and to construe and apply his injunction accordingly. It was certainly no unfair

construction of that injunction, under the circumstances, to regard it as a direction to the receiver to vote.

But it has been said (erroneously) that Groesbeck's suit in which he obtained this injunction, "set forth the circumstances *under which the receiver had been appointed*, and showing the illegality of the proceeding."[1] There was not a word in Groesbeck's complaint, from which the judge who granted the injunction could infer that this stock had been ordered into the hands of a receiver, nor was the receiver made a defendant in Groesbeck's suit, as he must have been if the injunction obtained was intended to affect *him*. But if he had been made a party to the suit, or the Albany court had been informed of his receivership, and the injunction about voting had been issued just as it was, then the true legal construction of that injunction would have been that Fuller was the "holder" of the stock. As it was, in point of fact, the injunction not being specially directed *against* the receiver and there being nothing to inform Mr. Shearman that the judge who granted it did not know of the receivership, Mr. Shearman was obliged to assume that the injunction meant by "holders" of the stock the person who was then the "holder" in contemplation of law. It has been said that this view of Mr. Shearman's course is a "pretence" resting "on an intrinsic absurdity," and that when Mr. Field explained Mr. Fuller's voting, in one of his published letters, by reference to the operation of this injunction in creating a necessity for his voting, he "misstated the facts." I have only to submit to the candid judgment of the bar, whether there is any "pretence" or "intrinsic absurdity" in the view which I have taken of the operation of that injunction, and of the necessity for giving it a construction under which it was proper for the receiver to vote. That there is any "intrinsic absurdity" in this view, I think few sound lawyers will affirm, even if they think the injunction should not have been so construed; and that Mr. Shearman could honestly construe it as he did, will be thought by most impartial persons to

[1] General Barlow's letter.

be a very clear proposition of morals, even if they do not concur in his law.

In the foregoing discussion I have considered only the question of whether Mr. Shearman, in construing the injunction as he did, acted fairly and honestly. This is all that is necessary to his vindication. I ought to add, however, that in my opinion, after the service of this injunction on the inspectors, it became the duty of the receiver to vote, and that Mr. Shearman's construction of the injunction was under the circumstances correct. I do not think that this question depends upon the intention with which Groesbeck and others obtained the injunction. It depends upon the true legal construction of the injunction. It could not be construed to mean an absolute prohibition against receiving the votes of the parties who held 10,400 shares of stock. It was a conditional order, meaning that when votes had been received on the 3,000 shares of (so-called) Groesbeck stock, the parties who held the 10,400 shares might be allowed to vote; and there was no mode in which that condition could be complied with excepting by allowing the receiver to vote.

And this seems to be the proper place in which to state that this receivership still continues. It will be remembered that the original order appointing the receiver required the defendants Groesbeck and others to show cause before Judge Barnard on the 19th of August (1869) why it should not be confirmed. It has been represented that Groesbeck and the other claimants never appeared. General Barlow, in his letter to the *Tribune*, in rejoinder to Mr. Field, said: "Groesbeck's counsel were too familiar with the performances of Fisk, Gould, Field, Shearman, and Barnard, to waste their time in arguing against the order before the judge who granted it. They did not propose to go through any such farce. They waited until the matter could be heard before an impartial judge (Smith), and the receivership was then pronounced to be illegal. Their omission to show cause against it before Judge Barnard, merely showed their entire distrust of him as a judge, and their knowledge

of the relations existing between the judge, parties, and counsel."

There is no foundation for these statements. On the contrary, I have personally inspected a long series of orders made in the case, extending from August 19, 1869, to May 1, 1871, showing the appearance of the defendants, and the repeated confirmation of the receivership from time to time, until cause should be shown against it. On the 19th of August, 1869, the defendants, Groesbeck and others, appeared by a highly-respectable firm of lawyers, and the hearing was by consent adjourned to August 24th, on which day an order was made, reciting that a motion for continuing the appointment of the receiver coming on for argument and parties on both sides appearing by counsel, it was ordered that the motion stand over to the 15th of September, and that in the mean time, and until the hearing and decision of the motion, the appointment of a receiver theretofore made be confirmed and continued, and that the injunctions issued therein be also continued and confirmed. This order was made by consent of the defendants' counsel; so that when the election of directors came on at Albany, the provisional possession of the receiver had been confirmed with the assent of the very parties who are said to have known too well the relations between the judge, the other parties, and their counsel, to make any appearance in the case. By a series of similar orders, all regularly made by consent, the motion has been adjourned, and the receivership has been continued, down to May 1, 1871, at which time I am writing.

It remains for me to examine briefly the complaints that have been made against Mr. Field on account of what he did or is supposed to have done in a suit brought by Mr. Ramsey against the Erie Railway corporation and certain of its directors. I have found some difficulty in reducing these complaints to a substantive and tangible form. They have been made and discussed in a way that seems to me to

be conducive to any thing rather than to the promotion of a sound professional morality; for there appears to have been a serious lack of condemnation in regard to the proceedings which it became Mr. Field's duty to oppose. Perhaps this is owing to the fact that he had to act in some degree in defence of interests with which are identified the names of Fisk and Gould; persons whose names it would seem it is only necessary to mention, to call into activity an amount of prejudice before which it is apparently expected that Justice will drop her scales and Reason renounce her office. But as I have never seen either of them, to my knowledge, and do not possess any acquaintance with their general merits or demerits, I may be permitted to observe that if they have never done any thing worse than to defend the great corporation whose interests are said to be under their charge as they defended them against Mr. Ramsey's suit, they have not much to answer for.

On the 13th of September, 1869, a suit was commenced by the Attorney-General of the State in the name of The People against the Albany & Susquehanna Railroad corporation, both of its claiming Boards of Directors, and the contending receivers, to determine whether either and which of those boards and receivers had a good and valid title to the offices which they claimed, and if neither, to order a new election. Prominent among the defendants to this suit were Messrs. Fisk and Gould, officers and principal managers of the Erie Railway Company. This case was to come on for trial in the Supreme Court, Special Term, in Monroe County, at Rochester, on the 29th day of November, 1869, before Judge E. Darwin Smith.

On the 17th of November, 1869, Joseph H. Ramsey made oath in the City of Albany to a complaint made by himself as plaintiff against Jay Gould and James Fisk, Jr., Frederick A. Lane, and others, and the Erie Railway Company as defendants. The attorneys employed by Mr. Ramsey to bring his suit were practitioners in the City of New York. The principal offices of the Erie Railway Company were in this city, and here all its principal offi-

cers and all the individual defendants named (except one, who lived at Jersey City) had their residences or places of business. The original complaint, which I have seen, was at first entitled as of "Broome County," but was afterward altered to "Delaware County." "Broome" is the county of which Binghamton is the seat, at which city Judge Balcom, of the Supreme Court, resides. Whether the plaintiff applied to Judge Balcom, or any judge in Broome County to make the orders for which the complaint prayed and which were granted in Delaware County, is perhaps not sufficiently indicated by the fact that the complaint was entitled of Broome County. This fact may afterward have given rise to a suspicion that Judge Balcom had been applied to and had refused to make the orders. If this was so, it was a clear violation of a statute to obtain the same orders from another judge. But when the first knowledge of this suit reached the defendants, their attention was not directed to this inquiry, for they did not know that the complaint had been originally so entitled.

The complaint alleged that the plaintiff Ramsey was a creditor and stockholder of the Erie Railway Company, and that he brought the suit also in behalf of all others in the like situation. The statement that he was a creditor and stockholder was the only averment made in the complaint on personal knowledge. The only cause of action against the defendants, filling more than 330 folios, was averred on information and belief alone, and the *jurat* gave it no greater force.

In regard to the plaintiff's interest as a creditor and stockholder, he represented himself as the owner of several bonds issued by the company, and of certain shares of its stock not registered in his name, but "*entitled* to be standing in his name on the books of the company."[1] (In point of fact, as a subsequent affidavit of Mr. Ramsey shows the plaintiff borrowed some money of David Groesbeck,

[1] The Circuit Court of the United States in this District has recently held that a person whose name is not registered as a stockholder cannot sue as such, although he may have purchased stock.

with which certain bonds and stock of the Erie Railway were purchased, and in some way they were left or pledged in the hands of Groesbeck as security.) The *gravamen* of his complaint was, as stated on his information and belief, that certain funds and property of the company were left by its officers in the hands of one or more of the other defendants or other persons not collected or properly cared for and in peril of being lost; and further, that the company was generally in a perilous condition in consequence of the neglect of its directors to meet and give the necessary attention to its affairs for the protection of its property in the discharge of their functions. The complaint prayed, *first*, for a special receiver of the funds and property specially described to be in danger of being lost; *secondly*, for a general receiver of all the property and franchises of the company (except the franchise of being a corporation) and of all its funds, books, papers, and property, excepting those to be placed in the hands of the special receiver. On this complaint and certain affidavits accompanying it, Judge Murray, of Delaware County, at a Special Term of the Supreme Court, held at Delhi, in that county, on the 23d of November, 1869, on motion of Mr. Henry Smith, of counsel for the plaintiff, granted an order, appointing David Groesbeck special receiver of the funds and property specially described in the complaint to be in peril of being lost, with very extensive powers in relation thereto, and also in relation to an examination of the books and papers of the company. The order further declared that it appeared to the court that if the unsuspended directors of the company should omit to meet, or neglect to take charge of, and give necessary attention to its affairs or the protection of its property and the discharge of their functions, or if a certain number of the unsuspended directors should resign, or omit, or refuse to attend meetings of the board, so that no quorum and legal action could be secured, in either event the public interests would be seriously prejudiced, and the company and its creditors would suffer great loss. The order further de-

clared that it appeared to the court that the company was in a perilous condition, and that there was imminent danger of some such event; and that upon the happening thereof, there ought to be a receiver of the court ready and competent, and whose right and duty it should then be to enter at once into possession of the property and exercise the franchises of the company, with the powers provided in the order on the happening of any such event. The order then proceeded to appoint David Groesbeck receiver of the company, its property, and franchises, as prayed for, with power to operate the road and all its branches, and with the most extensive and sweeping powers that can be conferred upon a receiver. On the same day, November 23d, Mr. Smith, on behalf of the plaintiff Ramsey, obtained from Judge Murray another order suspending Gould, Fisk, Lane, and five other directors of the company, named defendants, from acting either as directors or officers of the company, or acting about its affairs in any capacity whatever till the further order of the court in that case, and appointing a referee to take evidence to be used on the final exercise of the powers of the court in reference to their suspension or removal from office. Mr. Smith also obtained, on the same day, November 23d, a third order from Judge Murray, restraining all creditors of the company from instituting any suit to collect or secure their debts; restraining all the defendants from instituting any suit to embarrass or delay Mr. Ramsey's present suit; restraining the defendants from accepting or admitting service for the company of any summons, complaint, notice, or other paper, either in Mr. Ramsey's present suit or in any other suit involving their official conduct, and restraining them from authorizing any appearance in any such suit, and directing the company and the directors not suspended to take promptly proper action for causing the company to be faithfully and adequately represented in this (Mr. Ramsey's) present suit, and restraining them, the unsuspended directors, from resigning without three days' written notice to his (Mr. Ramsey's) attorneys, stating when such proposed resignation was intended to take effect.

It is not my purpose to characterize these proceedings and occurrences (the original suit, the strange appearance of Mr. Runkle as attorney for the company mentioned hereafter, and the orders obtained), further than to say that they were calculated to arouse the utmost suspicion on the part of the legal advisers of the Erie Railway Company, and to call for the most vigorous measures of defence. It has been said that, if the order providing for a receiver had been carried out, the company would have failed the same day; and I cannot but think that the remark was well founded. The case bore no comparison whatever to the appointment of a receiver of the Albany & Susquehanna Railroad. In that case, as I have shown, a receivership was a measure of immediate and pressing practical necessity. In this case a receivership was necessary only in a theoretical and fictitious sense. In the one case, those who had the official charge of the road under its ordinary organization could not act. In the case of the Erie Railway, at the time Mr. Ramsey brought his suit, every officer of the company was in the actual discharge of his functions, and, but for the contingency created by the three orders obtained by Mr. Ramsey, must have remained competent to the discharge of his duties. Yet the orders were so framed as to make it possible, by their combined operation, if withheld from the knowledge of the officers of the company for a certain period of time, to have the whole property, franchises, and management of this great corporation swept into the hands of Mr. Groesbeck, as receiver, Mr. Groesbeck being the person who had advanced money to Mr. Ramsey to enable him to purchase, or having purchased for him, the bonds and stock on which Mr. Ramsey founded his claim to take these proceedings against the company as a creditor and stockholder.

I do not think it can be claimed that Mr. Ramsey had shown in this complaint that he was such a creditor or stockholder of the company as could demand the appointment of a receiver of even the special funds which he sought to reach by the special receivership. But if this point were conceded, it is clear, in my opinion, that the Code has not

authorized the appointment of a general receiver of all the property and franchises of a corporation, to take effect on the happening of a future contingent event, which may or may not happen, and which must happen before any necessity for a receiver can be said to exist. If the Code had made any such provision, then it would be in the power of a plaintiff to exercise some control, or lay some plan for the happening of that event, and by his own act bring about the event on which the appointment of the receiver would take effect. But such as this singular order was, it came into operation with the two other orders, because they were signed by a judge of the court.

On the 24th of November the Secretary of the company was served with the summons, complaint, and injunction in this suit (but not with the order for a receiver), the place of trial being fixed at Delhi. This village, one of the most inaccessible in the State from the City of New York, was then over twenty miles from any railroad, and must be reached by a drive of that distance over a mountainous region. On the same day, the 24th, the plaintiff's attorneys in New York arranged with Mr. Runkle, an attorney in this city, to appear for the corporation, and received from him a notice of his appearance as attorney for the corporation in the suit. The reason afterward given by Mr. Ramsey's attorneys for making this arrangement with Mr. Runkle was, that they supposed themselves to have been authorized to accept Mr. Runkle's appearance by Mr. Diven, one of the directors; but this turned out not to be correct. The Secretary of the company immediately took the papers which had been served upon him to the office of the company, and thereupon the Executive Committee of the directors immediately authorized Field & Shearman to appear for the corporation. These gentlemen, on the same evening, sent a notice of appearance to Mr. Ramsey's attorneys in the suit, who refused to receive it, stating that another attorney had already appeared, whose name they declined to give. Prompt and energetic action on the part of the defendants became thus necessary.

The situation appears to me to have been most extraordinary, embarrassing, and perilous. That the unprofessional reader may properly appreciate it, some explanation in detail is necessary.

An attorney who appears in a suit is an officer of the court, and is presumed to do his duty. His appearance is conclusive upon the party whom he undertakes to represent, until it is set aside by an order of the court. If he assents to any order or proceeding in the cause, although it may have been entirely unauthorized by his client, it will not, as a general rule, be afterward set aside, until the client who is injured has shown affirmatively that the attorney is not of sufficient pecuniary ability to respond in damages for the wrong occasioned by his unauthorized act.

It must have been obvious, then, to Field & Shearman (who, with their clients, were kept in ignorance of the name of the receiver until December 2d) that after the appearance of an attorney for the company defendant, whose name the plaintiff's attorneys refused to disclose, the rights and interests of the company were exposed to a very uncommon peril; that to change this state of things and to be admitted themselves to appear for the company was a step of the first necessity and their manifest duty; and to this end they must ascertain the name of the unknown attorney. There was but one mode of proceeding in the cause itself, by which they could compel the plaintiff's attorneys to disclose the name of the unknown attorney who had appeared for the company, and by which, after they had ascertained his name, to cause themselves to be substituted in his place. If they were to attempt to make any motion whatever in the cause, before they had been substituted as attorneys for the company defendant, they were liable to be turned out of court because another attorney had appeared for the company. Now, a motion to compel the plaintiff's attorneys to disclose the name of the unknown attorney who had appeared for the company, would have to be made in the Sixth Judicial District, in which Delaware County is embraced. A motion for this purpose, upon notice of at least eight days to the

plaintiff's attorneys, would have to be made to some judge in that district. If such a motion were made and granted, the plaintiff's attorneys could cause further indefinite delay by an appeal from the order, or by other means. When the name of the unknown attorney had been at length obtained, another motion would have to be made in the Sixth District, upon a like notice of at least eight days to that attorney himself, who could appear and oppose the motion, for his removal and the substitution of Field & Shearman as the properly-authorized attorneys for the company. If the motion were granted, compliance with this order might, in turn, be greatly delayed; and yet until all these preliminary steps had been taken and fully accomplished, Field & Shearman, the only authorized attorneys for the company in this suit, could not do one act in the suit itself for the protection of the company against the combined operation of the three orders which had been obtained from Judge Murray by the plaintiff. There was, however, one alternative. They could bring a cross-suit against Mr. Ramsey, his attorneys, the unknown attorney who had appeared, and the unknown receiver, and enjoin them all from proceeding to enforce the three orders until the further order of the court. No one, I think, can justly say that such an injunction was either unnecessary or oppressive. Nor does it appear to me that there is any ground whatever for the imputation that its purpose was to put Mr. Ramsey's original suit within the control of *Judge Barnard*. He happened to be the only judge holding a Special Term in this county, who was in town on the evening when the injunction was for the first time found to be necessary.

The papers in the cross-suit were prepared on the evening of Nov. 24th, and were immediately presented by Mr. Aaron J. Vanderpoel[1] to Judge Barnard, who signed an injunction the next morning, with an order to show cause on the 30th why it should not be continued. This was served on Mr. Ramsey's New York attorneys on that day, and on him at Albany on the next day. After the service of this injunction, Mr. Ramsey's New York attorneys ar-

[1] A counsellor of well-known standing in this city.

ranged with Mr. Runkle to withdraw his appearance for the corporation, and informed Field & Shearman that he had done so; but they did not recognize the appearance of Field & Shearman. Mr. Ramsey's attorneys in New York then caused the substitution of Peckham & Tremaine, of Albany, in their place, as attorneys for the plaintiff, and informed Field & Shearman that they had ceased to be attorneys for the plaintiff, but would not give the names of the attorneys substituted. Peckham & Tremaine, however, notified Field & Shearman, on the 29th, of their substitution, and Field & Shearman obtained from Judge Balcom, on the 21st of December, an order that their appearance for the company be accepted, and that any notice of appearance from other attorneys be disregarded. On the 21st of December, Judge Balcom, on a motion made by Field & Shearman, at Binghamton, set aside Judge Murray's three orders made in Mr. Ramsey's original suit. From this order of Judge Balcom's Mr. Ramsey appealed, but the appeal was withdrawn in September, 1870. Pending the appeal, Judge Murray's orders remained without operation until the case should be finally heard.

In May, 1870, as soon as Mr. Ramsey's original suit was at issue, Field & Shearman made an application to the Supreme Court at Delhi, to change the place of trial to the County of New York, on account of the convenience of witnesses.[1] This was opposed at first by Mr. Ramsey, on an affidavit stating that he was under an injunction in the cross-suit, and could not therefore take such measures as were necessary to oppose the motion. This objection was answered by Judge Gray, of Elmira, now a member of the commission of Appeals, then acting as counsel for the company, and was overruled by the Court. Mr. Ramsey then asked for an adjournment. This was granted for two weeks, the motion for changing the place of trial to be heard at Binghamton on the 31st of May. Mr. Ramsey appealed from this order, and then got a stay of the proceedings from Judge Clute, in Albany, but did not serve it until the 30th of May, in order, as it appears from an affi-

[1] This application was made under a statutory provision

davit that his counsel avowed in court, to prevent Field & Shearman from having the stay set aside. When this stay was served on Field & Shearman in New York, they obtained an order from Judge Cardozo to show cause the next day at Binghamton why the stay should not be set aside. The next day was the day for hearing the motion at Binghamton to change the place of trial. Judge Cardozo's order to show cause was served at Albany on Mr. Ramsey's attorneys in the afternoon of the 30th. At 9 P. M. that evening, a train left Albany for Binghamton. Field & Shearman's messenger carried Judge Cardozo's order and an affidavit of service to Binghamton by that train. Mr. Ramsey's attorneys, in Albany, on the same day, obtained from Judge Peckham a counter-stay of Judge Cardozo's order, and sent it down to New York and had it served on Field & Shearman at ten minutes before ten o'clock A. M. on the 31st, when the motion to change the place of trial of Mr. Ramsey's original suit, and the motion to vacate Judge Clute's stay, were to be made at Binghamton at ten o'clock that day. Mr. Shearman, who was then at Binghamton, brought on both motions in ignorance, of course, of this last stay granted by Judge Peckham, and both were granted. Mr. Ramsey's counsel then moved, at Binghamton, before Judge Murray, to vacate Judge Balcom's order changing the place of trial; but Judge Murray held that the motion must be made in New York. Mr. Ramsey's attorneys then gave notice of motion before Judge Barnard, in New York, to vacate Judge Balcom's order. This motion came on to be argued in August, and was denied; and Ramsey's attorneys thereupon appealed from this denial to the General Term, by which the denial was afterward affirmed.

After Mr. Ramsey's original suit had been transferred to the County of New York, his attorneys noticed the cross-suit for trial at a Special Term to be held by Judge Barnard, in October. Field & Shearman then noticed the original suit for trial at the same term. Both cases were called in the order of the calendar on the 5th of

October. Mr. Ramsey's counsel moved to postpone both for the term. The court refused this motion, and the cases were set down for trial on the 20th of October. Mr. Ramsey's counsel again moved to postpone for the term, on his own affidavit. Mr. Field, appearing as counsel for the company and the first seven individual defendants, together with counsel appearing for the other defendants, opposed this motion. The principal grounds on which the motion to postpone was urged were, that Mr. Ramsey had made no preparation for trial, because he was under an injunction in the cross-suit, and that his preparation required an extended examination of the books of the company, and conferences with numerous witnesses; also that in a proceeding against him for a contempt of the injunction he had appealed to the General Term, and that if their decision should be against him, he should appeal to the Court of Appeals, and that, with this matter pending, the trial of the cases should not go on. On the other hand, it was answered that the witnesses were in New York, which was now the place of trial, that both suits had been on the calendar from the beginning of the term, that no application had been made by Mr. Ramsey for a discovery or inspection of the books, that the nature of Mr. Ramsey's suit and the three orders which he had obtained, had placed the company in a position in which it was absolutely necessary to hold the plaintiff now to proof of his case, which could be proved, if true, as well now as at any future time. It was further answered, that he had not brought himself within the rule respecting motions for postponement, because his affidavit did not aver the existence of any facts or suggest the name of a witness not known to him when he made the allegations of his complaint; and that he had not shown by his affidavit that the books contained evidence in his favor. It was further answered that, as to the injunction in the cross-suit, the judge who granted it had set the case down for trial on the 20th, and that it was not to be supposed that Ramsey would be punished for a contempt in violating that injunction by making preparation in a case the trial for which had been so appointed; that he might have

applied on the 5th of October for a preliminary examination of witnesses or of the books, and that he had made no such application. It was also answered, that he had already disobeyed the injunction on several occasions which were detailed and described by the counsel for the company and his associate.

As a matter of law and practice, I take it for granted that, by noticing the case for trial, the counsel for the company had waived the injunction to this extent that they could not proceed for a violation of it after that notice; that inasmuch as the court, on the 5th of October, had set the cause down for trial on the 20th, it was not to be presumed that the court would entertain any application to punish Mr. Ramsey for a contempt in making preparation for a trial which the court had ordered, and that as Mr. Ramsey had shown that he could previously disregard the injunction, it ought not to have been considered now as an obstacle to a trial. But it appears, on the proceedings, that in order to obviate all objection on account of the injunction, Mr. Field offered in court a stipulation that the injunction in the cross-suit should not be held to interfere with the trial or Mr. Ramsey's preparation for it. Thereupon the court refused the postponement, and the cause was set down for trial peremptorily on the 25th. Mr. Ramsey subpœnaed several of the directors and officers of the company for that day, and they were in attendance. When the case was called, his counsel again moved to postpone. After argument on both sides, embracing the entire history of both cases, the court denied the motion to postpone, and ordered the trial to proceed. Mr. Ramsey's counsel then asked leave to withdraw for consultation, which was granted. In about half an hour they returned into court, and objected to trying the case before the judge then holding the court, because he was prejudiced. Thereupon the court, on motion of the defendants' counsel, ordered the complaint to be dismissed with costs, with an extra allowance to be fixed by the court before the entry of judgment, the extra allowance to be fixed on the 14th of November and the judgment to be thereafter

entered, but with leave to the plaintiff then to come in and try the cause. The order was, in fact, not entered, but was noted on the clerk's minutes. The defendant's attorneys were about to enter an order and to give notice that the extra allowance would be fixed on the 14th of November, but with leave to the plaintiff then to come in and try the cause; but the plaintiff anticipated this by a notice of motion, accompanied by an order staying all proceedings. On the 23d of November the plaintiff obtained an order at Chambers, setting aside the incomplete proceeding of October 25th. From this order the defendants appealed to the General Term, which has the matter still under advisement.

The mere statement of these proceedings in the order in which they occurred seems to me sufficient to dispose of the charges that Mr. Field brought the cross-suit against Mr. Ramsey for the purpose of oppressing him; and that he forced Mr. Ramsey to trial of his original suit with his hands tied. In regard to the cross-suit, it certainly cannot be said to be settled law in this State, that an injunction may not, in any case, be granted in one judicial district of the Supreme Court, to restrain the proceedings in another suit instituted in another judicial district. And as to the general principles and practice which regulate the exercise of equitable jurisdiction by judges of coördinate authority, it is well settled that there are two classes of cases in regard to which a discrimination is to be made. In all ordinary cases where a Court of Equity is invoked to act upon proceedings in another court of coördinate jurisdiction, I understand it to be the practice of judges to give effect to the comity that is due to each other. But there may be cases in which mere comity would defeat the ends of justice. Where there is reason to believe that a suit is fraudulent, where great mischief would ensue from a forbearance to use the restraining powers of a Court of Equity, and where the wrong that is threatened would inevitably result from an abuse of the process of another court, I understand that an injunction may issue, not to act upon the other court, but to act upon the party who is misusing its process.

In regard to "forcing a party to trial with his hands tied," I confess that I do not appreciate the doctrine which would oblige counsel to refrain from using all available and legitimate weapons of the law to defeat a suit which he had reason to believe, and did believe, was of a character to which no indulgence should be extended. But it is not necessary to enlarge upon this topic, because I do not think that Mr. Ramsey had any just reason to complain of Mr. Field, when the latter finally insisted that the case should be either tried or dismissed. And as to the charge that has been made against Mr. Field, of having for a wrongful purpose procured a transfer of this case into this county, in order to get it under the control of Judge Barnard, it is like most of the other charges which I have had occasion to examine. It begins by assuming the corruption of the Judge, and the willingness of the counsel to avail himself of that corruption, and then proceeds to the conclusion that, although there existed a statute provision authorizing the place of trial to be changed, the counsel could not have made an honest use of that provision. I do not think I ought to occupy more of the reader's time in discussing such a proposition.

In reviewing these proceedings and what has been said about them, I have been much impressed by the fact that this community is now brought face to face with direct imputations of corruption made in the public prints against one of its judges, over the signatures of known members of the Bar. I have had to deal, however, with the alleged existence and character of that corruption, only by reason of what is complained of in Mr. Field, namely, that he ought to have refrained from applying to the particular judge who has been named, to obtain orders and injunctions in the interest of persons with whom it is alleged that this judge has relations that are tantamount to a corrupt connection, because, as is alleged, he knew of that connection. If the judge in question is a man who is capable of using his office contrary to law and to what is right, to promote the interests of anybody, which I for one do not believe, it is wrong

for the other judges who sit with him on the bench to transact judicial business with him. It was wrong for the Governor to assign him as one of the Judges in General Term for five years—a most responsible and important position. Nay, it was doubly wrong for the people to elect him to the bench, as they have done twice by majorities that have shown that he is not indebted for his position solely to a party. If he is a corrupt judge, the people, their Executive, and his Associate Judges, are all engaged in a general conspiracy against the public virtue and honor. In the name of all that is pure and sacred, let us have an end of these imputations, or else let them be proved to be true by some other form of proceeding than by attacking a leading member of the Bar for appearing before the judge who is the subject of such suspicions. Instead of having gone out of his way to seek a judge said to be notoriously favorable to his clients, I should infer from the proceedings that I have had occasion to examine, that Mr. Field has paid no attention to the inquiry whether the judge in question was on the bench, that he has acted just as he must have acted if he had applied to any other judge, and that there is no ground whatever for charging him with a conscious purpose to avail himself of a supposed willingness of Judge Barnard to fulfil the function of "the favorite judge" of his clients. I think this was the proper course to pursue; for I cannot concur in the opinion that he should have avoided Judge Barnard, because of any prevalent scandal. I do not see how the judicial business of this community is to be transacted, if censure of Mr. Field on this ground is to prevail.

The following is a summary of the conclusions at which I have arrived:

1. That the contest to obtain a majority of the Board of Directors of the Albany & Susquehanna Railroad, in the summer of 1869, originated between two parties among its stockholders and directors, and not with any person connected with the Erie Railway Company; but that one of those parties, after the contest had commenced, sought the aid of Messrs. Fisk & Gould, officers of the Erie Railroad,

in the purchase of stock preparatory to the election, which aid was afforded in a lawful and unobjectionable manner.

2. That the several orders granted by Judge Barnard, directing the transfer of certain stock to Wilber, directing the suspension of Ramsey from the offices of President and director, appointing Fisk & Courter receivers of the road and its property, and issuing writs of assistance to enforce their title, and also the several orders made by Judge Clerke, removing the inspectors of election chosen in 1868, and conditionally restraining votes on 9,500 shares of stock claimed to have been subscribed for on the 5th of August, were all duly and properly made and granted, and were made necessary by incidents successively arising in the progress of the contest.

3. That the appointment of Mr. Fuller as receiver of certain stock claimed by Groesbeck and others, was obtained by Field & Shearman, and was duly and properly made by Judge Barnard, for the protection of important interests of the company, and not for the purpose of putting the votes on that stock within the control of one of the parties to the contest, to be voted upon by them or in their interest at the election of directors.

4. That the act of Mr. Fuller in voting at the election on the stock held by him as receiver, was made necessary by an unexpected and unforeseen occurrence, and was under the circumstances correct.

5. That the suit instituted by Field & Shearman, for the purpose of compelling a restoration of the books and papers of the company to its office, from which they had been clandestinely removed, was instituted by the express and formal authority of the Executive Committee of the Board of Directors, and of the Vice-President acting as President; that the order of arrest issued therein was duly and properly issued, in order to compel the production of the books and papers; that the arrest of Messrs. Ramsey, Phelps, and Smith, at the rooms where the election was to be held, and just as the first stockholders' meeting was about to be organized, was accidental and unpremeditated; that the

sheriff alone was responsible for it, and that none of the counsel or attorneys of the Church party directed it or knew that it was likely to happen; that bail was procured and accepted on the spot; that no material restraint was exercised beyond the sheriff's request to the parties arrested not to leave the building until bail-bonds had been executed; and that the arrest prevented none of the parties from participating in the election.

6. That both parties were attended at the election by a considerable number of persons who were not stockholders; that those who so came in the interest of the Church party, not exceeding thirty in number, were not brought there for the purpose of overawing the meeting, and did not in fact by their presence exclude any stockholder in the Ramsey interest from the room; that each of them held a genuine proxy for some stockholder in voting at the preliminary organization; that their conduct was not disorderly; and that the evidence that has been taken on this subject does not warrant the belief that the room was preoccupied by a crowd of "roughs," in the interest of the Church party, for the purpose of carrying the election by violence or fraud.

7. That whatever may be the true legal conclusions respecting any question of law or practice involved in any of the acts done or advice given by Mr. D. D. Field, or any member of the firm of Field & Shearman,[1] in any of these proceedings, no just imputation of professional impropriety rests upon them or either of them on account of any such act or advice, either in respect to the proceedings connected with the contest for the election of directors of the Albany and Susquehanna Railroad Company, or in respect to any act done or advice given by them or either of them, in defending the Erie Railway Company and certain of its directors against the suit brought by Joseph H. Ramsey, in 1869, or in the cross-suit against him.

I cannot dismiss this subject—to which I do not mean

[1] David Dudley Field, Dudley Field, Thomas G. Shearman, and John W. Sterling, are partners, the first acting only as counsel, and the last three acting as attorneys, under the name of Field & Shearman.

hereafter to revert, unless some statement that I have made shall be called in question—without expressing my opinion that such discussions, charges, and imputations as those which I have been obliged to examine, have no tendency to promote professional integrity and honor. The surest way to do that, is to recognize and maintain the distinction between counsel and client, and not to identify them; for while, on the one hand, it is of the utmost importance to a sound administration of justice that a lawyer should be allowed to do every thing for his client that he can honestly do, it is on the other hand perfectly clear that no lawyer can act freely and fearlessly within the limits of that principle, if he is to be subjected to a criticism which seeks for bad motives to the exclusion of the common presumption of good ones; which refuses to regard his conduct by the light of the law itself, and seeks to explain it by the suggestion that he acted for parties whose objects and methods are supposed to be subjects of general suspicion. There can be no safer rule for a lawyer to follow, than to assume it to be right to do for any man what the law allows to be done. In his efforts to reach what is lawful, and to apply it to the interests of his clients, he must undoubtedly not divest himself of a sound conscience; and he is in truth in the less danger of doing so, in proportion to the extent of his learning and his ability to discover and apply the law, for the law, it must not be forgotten, is the measure of the rights of all men in civil society. Nor is it just or rational to hold a lawyer to a moral responsibility for acting on what may afterward prove to be the wrong side of a legal question, or the failing side of a legal controversy. He is not responsible for the correctness of what he urges as law, because it is the function of a court to declare the law, and the function of the advocate to help the court to discover it, by presenting one side of the question, while precisely the same function is performed by another advocate on the opposite side. Neither is a lawyer morally responsible, in the use of legal process, for any thing but a conscious, fraudulent abuse of such process, by

employing it and perverting it to accomplish a purpose other than that for which the law has provided it. For this he certainly is responsible; just as one is, who uses a weapon maliciously to kill or wound another, which the law allowed to be created for the lawful purpose of self-defence. But in neither case is the unlawful and malicious abuse of a thing to be confounded with its lawful and proper use.

In submitting to the reader the results of my investigation into the complaints that have been made against Mr. Field, it is perhaps proper for me to say that, when I began them, I had known him for many years, as one lawyer knows another, but that we had never been intimate. Our relations were mutually respectful, and nothing more. In the prosecution of my inquiries into the numerous and involved controversies which I have had to examine, I have found him constantly ready to afford me any information that I required; and I hope it is scarcely necessary for me to say that, I have *endeavored* to make my inquiries as searching as the subject demanded that they should be. With regard to the three gentlemen who stand before the public as his prominent accusers, I can conscientiously say that I have sought to impugn the motives of none of them; and that I have therefore not sought to inquire for, or cared to know, whether there are or are not any relations which have caused them to view Mr. Field's conduct unfavorably, or to make the strictures which they have made. But as they are all by a good many years my juniors at the bar, I may perhaps suggest that, if their experience has not already taught them, further experience will teach them, that to the merits of most legal controversies there are two sides; and that, when a question is made concerning the professional conduct of those employed upon one of those two sides, there are important rules of judgment which in this instance they may have possibly failed to apply in making their strictures. And I may add, that those rules are to be derived not only from the law of the land, but also from a moral code that has a higher than any mere human sanction. For I do not understand the command,

"Judge not that ye be not judged; for with what judgment ye judge, ye shall be judged, and with what measure ye mete it shall be measured to you again," to have been intended to prevent us from forming and expressing opinions on the conduct of our fellow-men. He who gave that command, was well aware that judgment is at once a human function and a human duty, without which civil society cannot be carried on, whether that judgment is by a public official appointed to pass upon a charge of a formal nature, or whether it is by the private voice of individuals passing upon a less formal accusation. But I do understand that this great precept was intended to embody a rule which is alike to govern the judge on the bench, and the citizen who contributes in his degree to the formation of public opinion. I understand that this golden rule appeals not to charity, but to righteousness; not to mercy, but to a definite law and standard of determination. It is as if it had been said: Judge not unrighteously, lest ye be judged yourselves unfairly. Put away prejudice and sophistry and passion; form your conclusions by the proper laws of a rational belief; exclude no proper motives when they are consistent with the acts on which you are called to pronounce; believe in human integrity and virtue, until you are compelled by the immutable laws of right and wrong to believe that they have been overborne by temptation or swept away by the eagerness with which a rightful object may be pursued. Mete to others the same measure which ye demand for yourselves, for it is not lawful to judge of others as ye would not yourselves be judged.

ADDENDUM.

[Note.—It should have been stated on page 28, that it is the practice in this judicial district, when a particular litigation has been commenced before one judge, for the other judges to refer all subsequent applications to him.]

APPENDIX.

SUPREME COURT.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY
against
JOSEPH H. RAMSEY *et al.*

CITY AND COUNTY OF ALBANY, *ss.:*

Jonathan R. Herrick, being duly sworn, says:

1. During the whole of the year 1869 I was a director of the Albany & Susquehanna Railroad Company, and am still such director, and throughout the whole of that year, until the 7th day of September, I was the Vice-President of that company. I claim to have been Vice-President continuously ever since that time; but my right to the position since then has been the subject of dispute. My title to the office of director during the whole of that year has been adjudged to be perfect, and no appeal has been taken from that adjudication so far as I have any knowledge or belief.

2. From about the 4th day of August to the 7th of September, 1869, the defendant, Joseph H. Ramsey, although nominally President of the above-named company, was enjoined by this court from acting as such, and so far as I have any opportunity to observe he did not act as such, and

believing that he had ceased to act, I considered myself the acting President of the said company, and assumed in good faith the exercise of the President's duties. The said Ramsey was also absent from the City of Albany, or was so concealed therein that he could not be found, during a large part of the period last above mentioned, and I am informed, and believe, that he absconded from the said city with intent to avoid service of process of this court issued to the Sheriff of Albany.

3. On or about the 7th day of August, 1869, I discovered that the most important books of the said company had been carried away from its office. I inquired of the defendant Phelps what had become of said books, and he disclaimed having any knowledge concerning them. I was afterward informed, and believe, that he and the said Ramsey, Pruyn, and Smith, had coöperated together in carrying off and concealing the said books, and I was further informed, and believed, that the books had been carried out of the State of New York.

4. After I had assumed the duties of President, as aforesaid, I was served with a paper purporting to be an injunction restraining me from acting as a director of the said company, and I took no action as such until on and after the 31st day of August, when an order was made by this court in the action wherein said injunction was granted, permitting me and the other parties to such action to take proceedings for procuring the production and deposit of the said books, and until the order was made I was advised by my counsel, and believed, that I could not safely take any steps for the recovery of the said books.

5. Immediately after the order last above mentioned had been made, I instructed Messrs. Field & Shearman to take such measures as in their judgment might be most effectual for the purpose of recovering the said books and compelling their deposit in the office of the said company at Albany. A meeting of the Executive Committee of the said company was held, at which, as I am informed and believe, a resolution was passed authorizing Field & Shearman to com-

mence legal proceedings for the recovery of the said books, and this resolution was fully approved and sanctioned by me. Having been informed, and believing that said books were concealed in the safe of a hotel called the American House, in Pittsfield, Massachusetts, I went with Jacob Leonard and Martin D. Conway to Pittsfield, Massachusetts, on the night of the 31st day of August, 1869, and there found that John W. Van Valkenburgh, the former Superintendent of the Albany & Susquehanna Railroad, and a person who was entirely in the confidence and subservient to the will of the defendant, Joseph H. Ramsey, had been there on two different occasions, on one of which occasions he wrote a false name in the said hotel register. I was further informed and believed, and a number of circumstances existed which plainly indicated, that the books of said company were concealed in or near said hotel, and that the proprietor of the said hotel intimated his willingness to reveal the hiding-place of the said books if he was paid a sufficient sum of money. I thereupon consulted counsel in Massachusetts as to the expediency and practicability of recovering possession of the books by action there, and a writ of replevin was actually issued; but the laws of Massachusetts did not allow the breaking open of the safe in said hotel in which it was believed that the said books were then concealed, and in consequence the process was entirely ineffectual.

6. After the failure of legal process in Massachusetts, I was advised by counsel, and believed, that the most effectual mode of compelling the production of the said books would be by the commencement of an action for damages for this concealment against the defendants in this action, whom I then believed to have been concerned in the removal of the said books, and who have all since admitted that they were concerned in, or cognizant of, such removal and concealment, and approved of the same; and accordingly I authorized Field & Shearman to commence this action, and did so in good faith, believing that it was necessary for the purpose of compelling the deposit of the said books in the office of the said company.

7. I had no intention of using the process of this court in this action for the purpose of preventing any person from taking part in the annual election of directors of the said company, nor did I delay any directions concerning this suit for that purpose or for any other; on the contrary, I used all diligence, immediately after obtaining leave to do so, for the purpose of discovering said books, and I am informed and believe that the Executive Committee was got together as soon as it was possible; that, owing to the fact that no two of them reside in the same place, it required some time to get together the three members, who actually met and passed the resolution aforesaid; and I am further informed and believe that the utmost diligence was used by the counsel who were authorized by the terms of the said resolution, to prosecute legal proceedings for the recovery of the said books; that they did not receive a copy of the resolution aforesaid until Saturday, the 4th day of September, 1869; that they had not time thereafter to draw the papers necessary for the commencement of this action until Monday, the 6th of September; and that they obtained an order of arrest in the action at the earliest possible moment on that day, and sent it to Albany by the very first train leaving after it was obtained.

8. I know William H. Morgan, who was one of the counsel employed by Field & Shearman in this action. I was in Albany on the 6th and 7th of September, 1869, and I know that William H. Morgan did not arrive at the hotel where David Dudley Field and Thomas G. Shearman were lodging, until a very late hour at night, certainly not until after eleven o'clock, and it was therefore not possible to serve any papers which he brought until the following day. I was then informed, and believe, that he brought with him the papers in this action, including the order of arrest. There was no collusion between the Sheriff of Albany and myself, and I believe there was none on the part of anybody else with respect to the mode of service of the said papers; and I was then informed and believed, and still believe, that the same were given to the sheriff, in the regu-

lar way at an early hour in the morning of the 7th day of September, 1869, and that he was left to use his own discretion, free from all advice or control in respect to the service of the said papers.

9. I then believed, and still believe, that the injury to the plaintiff in this cause, by reason of the permanent concealment of the said books, would be very great, and that the amount of bail named in the said order of arrest was not unreasonable under the circumstances. I was then informed and believed, and still believe, that the said books showed the defendant, Joseph H. Ramsey, to have overdrawn his account with the said company in an amount exceeding twenty thousand dollars, and to be indebted to the said company in about one hundred thousand dollars more for subscriptions upon stock; and I then believed and still believe, that if the said books had been permanently concealed or destroyed, the plaintiff herein would have no evidence of the said indebtedness, and the said Ramsey would have escaped all liability for the whole or a large part thereof, and particularly for the amount of over twenty thousand dollars, which he had, as I believe, drawn in cash from the funds of the said company.

10. Although it has been since stated by the defendant Phelps, that he and Wilber F. Ramsey, the son of the defendant Joseph H. Ramsey, brought the said books to the office of the company on the night of the 6th of September, and secretly drew them up with a rope and a basket into one of the rear windows of the office, that fact was entirely unknown to me, and as I believe unknown to all the counsel engaged in this suit on behalf of the plaintiff until long afterward; and the fact that the books were in the office of the company was not made known to me, or to any one acting with me, so far as I have any knowledge and belief, until long after the service of the papers in this action, and after the annual election had closed; and I believe that the return of the said books was made in consequence of apprehensions entertained by the defendants herein of legal proceedings in the nature of this suit, and they were returned

in the secret manner aforesaid, for the purpose of enabling the defendant Phelps to obtain control thereof at the election, and to enable him by means of such control to give possession exclusively to one party at such election, and thus to enable them to conduct the same fraudulently, and to receive fraudulent votes.

11. Since the said Ramsey and his associates have been suffered to have control of the affairs of the said company, subsequent to the decision of Mr. Justice E. Darwin Smith, at Rochester, their evil motives have been more fully declared by acts and resolutions, by which stock and money of the said company, to large amounts, have been wrongfully voted to the said Ramsey.

12. William A. Rice, who has made an affidavit herein dated May 20, 1870, was, as this deponent is informed and believes, one of the conspirators with the said Ramsey, in all the said unlawful proceedings.

13. Of the fourteen directors of the said company at the time of the said election, eight were opposed to the said Ramsey and his associates, and disapproved of the abstraction of the books, and approved of the bringing of this action.

14. Azro Chase, Jacob Leonard, and David Wilber, were perfectly aware of the contents of the resolution of the Executive Committee of September 3, 1869, and as I am informed and believed, it is false that they or either of them claim or pretend that they did not know the contents of said resolution, or supposed that they only authorized some proceedings, to recover possession of the books.

15. The greater portion of the business of the company, until the litigation which arose in the summer of 1869, was conducted, as I am informed and believe, by the Executive Committee who brought and defended suits for the company, made contracts, and did all other necessary acts to conduct its affairs, which were afterward as a matter of form ratified by the directors. J. R. Herrick.

Sworn before me, this 30th day of May, 1870.

Martin D. Conway,

Commissioner of Deeds, Albany, N. Y.

SUPREME COURT.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY
against
JOSEPH H. RAMSEY
and others.

ALBANY CITY AND COUNTY, *ss.:*

Jacob Leonard, being duly sworn, says:

1. I was a director of the Albany & Susquehanna Railroad Company from September, 1868, until the 7th day of September, 1869, my title to said office during all that time being undisputed. I claim to have been reëlected a director on the 7th of September last, and my title is the subject of dispute.

2. On or about the 7th day of August, 1869, I discovered that the most important books of the said company had been carried away from its office. I inquired of the defendant Phelps what had become of said books, and he disclaimed having any knowledge concerning them. I was afterward informed and believed that he and the said Ramsey, Pruyn, and Smith, had coöperated together in carrying off and concealing the said books; and I was further informed and believe that the books had been carried out of the State of New York.

3. At about the same time I was served with a paper purporting to be an injunction restraining me from acting as a director of the said company, and I took no action in relation to the matters in controversy herein until on and after the 31st day of August, 1869, when an order was made by this court in the action wherein the said injunction was

granted, permitting me and the other parties to such actions to take proceedings for procuring the production and deposit of the said books; and until the said order was made, I was advised by my counsel and believed that I could not safely take any steps for the recovery of the said books.

4. A meeting of the Executive Committee of the said company was called at an early day as possible after the entry of the order last above mentioned, at which meeting a majority of the said committee were present, consisting of Azro Chase, David Wilber, and myself; and at said meeting a resolution was duly passed in the terms set forth in the affidavit of William A. Rice, upon which a motion has been made in this cause. I have never claimed or pretended that I did not know the contents of the resolution so passed; but, on the contrary, I knew what the said resolution was, and voted for the same.

5. Having been informed and believing that said books were concealed in the safe of a hotel called the American House, in Pittsfield, Massachusetts, I went with Jonathan R. Herrick and Martin D. Conway to Pittsfield, Massachusetts, on the night of the 31st day of August, 1869, and there found that John W. Van Valkenburgh, the former Superintendent of the Albany & Susquehanna Railroad, and a person who was entirely in the confidence and subservient to the will of the defendant, Joseph H. Ramsey, had been there on two different occasions, on one of which occasions he wrote, as I am informed, a false name in the said hotel register. I was further informed and believed, and circumstances plainly indicated, that the books of the said company were concealed in or near said hotel at which the said Van Valkenburgh lodged when there, and the proprietor of that hotel intimated his willingness to reveal the hiding-place of the said books if he was paid a sufficient sum of money.

6. I thereupon consulted counsel in Massachusetts as to the expediency and practicability of recovering possession of the books by action there, and a writ of replevin was actually issued, but that the laws of Massachusetts did not allow the breaking open of the safe in said hotel in which it

was believed that said books were then concealed, and in consequence the process was entirely ineffectual.

7. After the failure of legal process in Massachusetts, I and the members of the Executive Committee were advised by counsel, and believed that the most effectual mode of compelling the production of the said books would be by the commencement of an action for damages similar to the present action against the defendants herein, whom I then believed to have been concerned in the removal and concealment of the said books, and who have all, with the exception of the defendant Pruyn, since admitted, as I am informed, that they then were concerned in or cognizant thereof, and approved of the same, and for this reason, and believing that my duty as a director and officer of the said company required me to do so, and acting in good faith, believing such a measure to be necessary, I voted for the resolution authorizing Field & Shearman to commence legal proceedings, and approved of the commencement of this action as a means of compelling the deposit of the said books in the office of the said company. I believe that my associates acted also in perfect good faith in the matter, and I know that I did not and I believe that they did not have any intention whatever of using this suit or the process to be obtained therein as a means of interfering with the freedom of the annual election of directors of the said company, or for any other purpose not consistent with perfect good faith.

8. I did not, and I am informed and believe that no other officers of the said company did, give any directions for the delay of this suit for any purpose whatever, and I and my two associates on the Executive Committee assembled together at the earliest possible time after the order was made, allowing us to do so, for the purpose of taking the action contemplated by the said order, but we were unable to assemble together until the 3d of September, 1869, and it was impossible to send a certified copy of the resolution passed by the committee to the counsel therein named, so as to reach them before Saturday, the 4th of September, 1869.

9. I am informed and believe that the judge holding Chambers in the Supreme Court, in the City of New York, seldom or never sits in court many minutes after noon on Saturday, and that the counsel named in said resolution had not time after receiving a copy thereof which was necessary to enable him to proceed to draw the papers required for the commencement and prosecution of this action, so as to be able to present them regularly to a judge of this court in said city until Monday the 6th of September, 1869; that they obtained an order of arrest in this action at the earliest possible moment on that day, and sent it to Albany by the very first train leaving therefor, and that the said order of arrest and the other papers in this action did not reach the City of Albany until about midnight on that day.

10. There was no collusion between the Sheriff of Albany and myself, and I believe there was none on the part of anybody else with respect to the mode of service of the said papers; and I was then informed and believed, and still believe, that the same were given to the sheriff in the regular way at an early hour in the morning of the 7th day of September, 1869, and that he was left to use his own discretion free from all advice and control in respect to the service of the said papers.

11. I then believed and still believe that the injury of the plaintiff in this cause by reason of the permanent concealment of the said books would be very great, and that the amount of bail named was not unreasonable under the circumstances. I was then informed and believed, and still believe, that the said books showed the defendant, Joseph H. Ramsey, to have overdrawn his account with the said company in an amount exceeding twenty thousand dollars, and to be indebted to it in about one hundred thousand dollars more, for subscriptions upon stock, and I then believed and still believe that if the said books had been permanently concealed or destroyed, the plaintiff herein would have no evidence of the said indebtedness, and the said Ramsey would have escaped all liability for the whole or a large part thereof, and particularly for the amount of over twenty thousand

dollars, which he had as I believe drawn in cash from the funds of the said company.

12. Although it has since been stated by the defendant, Phelps, that he and Wilber F. Ramsey, the son of the defendant, Joseph H. Ramsey, brought the said books to the office of the company on the night of the 6th of September, and secretly drew them up with a rope and a basket into one of the rear windows of the office; that fact was entirely unknown to me, and as I believe unknown to all the counsel engaged in this suit on behalf of the plaintiff until long after; and the fact that the books were in the office of the company was not made known to me, or to any one acting with me, so far as I have any knowledge or belief, until long after the service of the papers in this action, and after the annual election had closed; and I believe that the return of the said books was made in consequence of apprehensions entertained by the defendant herein of legal proceedings in the nature of this suit, and that they were returned in the secret manner aforesaid for the purpose of enabling the defendant, Phelps, to obtain control thereof at the election, and to enable him by means of such control to give possession exclusively to one party at such election, and thus to enable them to conduct the same fraudulently and to receive fraudulent votes.

13. The Executive Committee of the plaintiff herein had full power and authority to direct the action to be commenced against the defendants herein, and against any other persons in the name of the plaintiff herein.

14. Every allegation of fraud or bad faith contained in the affidavit of William A. Rice herein is untrue of my own knowledge so far as the same regards me; and I am informed and believe that every such allegation is untrue in respect to my other associates on the Executive Committee who voted for the resolution aforesaid. The allegations of the said affidavit with respect to the intention with which this suit was commenced are entirely false, and are made by the said Rice without having any credible information upon the subject whatever. The allegations of the said af-

fidavit to the effect that this action was commenced and prosecuted contrary to the wishes of a majority of the directors of the said company, and without its authority, and that Field & Shearman were never employed by the said company, and never had any authority to act for it, are, and each of them is, untrue. The Executive Committee authorized was appointed by the directors of the said company, and authorized to act in the place of the Board of Directors when the same was not in session, and at least one-half of the directors aforesaid approved of the employment of Field & Shearman as attorneys in this action.

15. The charges of conspiracy in the said affidavit are also false; the fact that I and a majority of the Board of Directors of the said company being in office in August, 1869, were opposed to the administration of the defendant, Joseph H. Ramsey, and believed that he was mismanaging the road, and abusing his trust, squandering its funds, appropriating some of its property to his own private uses, and generally acting in such a way as to make it dangerous to allow him to remain in the office of President; and for these reasons we agreed to oppose his reëlection, either as a director or as President. For this purpose we requested the assistance at the annual election of a number of large stockholders, including the persons mentioned in this said affidavit, as well as others, and agreed upon a ticket for which we voted at the general election.

The defendant Phelps, acting in conspiracy with the defendant Ramsey, refused to allow stock to be transferred to David Wilber and other persons who were friendly to me, and pretended that he was forbidden by injunction to do so. But if any such injunction was obtained, I am informed and believe that it was obtained by collusion between the defendants Ramsey and Phelps, and the plaintiffs in the actions on which such injunction was granted.

JACOB LEONARD.

Sworn before me this 30th day of May, 1870.

(Copy) D. CADY HERRICK, *Commissioner of Deeds.*

SUPREME COURT.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY
against
JOSEPH H. RAMSEY, WILLIAM L. M. PHELPS, ROBERT H. PRUYN, AND HENRY SMITH.

ALBANY COUNTY, *ss.:*

William J. Hadley, of the City of Albany, being duly sworn, doth depose and say, that some time in the month of August, 1869, he was employed by Harris Parr, Esq., Sheriff of the County of Albany, as his attorney and counsel, to assist and advise him in the performance of his duty as to matters growing out of the controversy relating to the Albany & Susquehanna Railroad Company. That the reason given by said sheriff for wishing to employ deponent was, that Messrs. Hale and Hand, who were his usual counsel, had become interested as counsel on one side of such controversy. That deponent had not any interest or motive either personal or professional in such litigation except to advise the said sheriff as to the impartial and proper discharge of his official duty and to keep the said sheriff exempt from liability to either side if that were possible. That shortly after being so employed, various contradictory and conflicting orders and injunctions were made and issued, and it became a matter of the most extreme difficulty to know what was the duty of the sheriff in the premises. That to such an extent did this conflict of jurisdiction proceed that the Governor of the State issued public proclamation to the Sheriffs of Albany, Broome, Chenango, Delaware, Otsego, and Scho-

harie Counties, wherein, after referring to the then existing condition of things, the Governor made use of this language: "It cannot be possible for any sheriff to decide under the circumstances which of the judicial orders are regular and which are not," and thus the said sheriff was placed in a position in which one judge commanded him to do an act and another judge prohibited him from doing it, and the Governor proclaimed that it was not possible for the sheriff to decide what order was regular and what was not.

That previous to the 7th day of September, 1869, there had been, at different times, placed in the hands of said Harris Parr, as such sheriff, for service, several non-bailable attachments against Mr. Robert H. Pruyn, for an alleged contempt, issued out of the Special Term of the Supreme Court at the Court-house in the City of New York, held by and before the Hon. Mr. Justice Barnard; that to such attachments the said sheriff had returned that the said Robert H. Pruyn could not be found in the County of Albany, he being, as was then generally understood, absent from this State: That as deponent was informed and believes, previous to the said 7th day of September, there had been at least two several attachments issued against the said Harris Parr, as such sheriff by the Special Term in the City of New York, for not having promptly returned process delivered to him, when only twenty-four hours were allowed him to do so, and deponent was admonished by such proceedings that it was the intention to hold the said sheriff to the most strict and vigilant discharge of his official duty, in promptly serving all orders and papers issued to him for that purpose.

That on the morning of said 7th day of September, 1869, the said Sheriff Parr called at the office of deponent and remarked, "I have received more papers for service, with instructions to do my duty," and handed to deponent a large package af papers for examination and advice. That on examining such papers deponent found them to be:

1. A pluries non-bailable attachment issued from the Special Term in the City of New York, against Mr. Robert H. Pruyn, for an alleged contempt in disobeying an injunc-

tion granted in the Supreme Court, in a suit wherein Azro Chase was plaintiff, and the Albany & Susquehanna Railroad Company were defendants, *and which attachment was made returnable forthwith.*

2. The summons and complaint, order of arrest, and affidavits in this cause and copies for service upon each of the above-named defendants.

That after examining such papers and inquiring if the said Robert H. Pruyn had returned to the said City of Albany, and being informed by the said sheriff that he did not know whether the said Pruyn had returned or not, deponent advised the said sheriff, and believed that if the said Pruyn had returned, he would be more likely to be found at the offices of the Albany & Susquehanna Railroad Company than at any other place; that it was the duty of the said sheriff to look for him there; that if the said Robert H. Pruyn had returned, and it should become publicly known that he had appeared there, and the said sheriff should neglect to arrest him, Judge Barnard would undoubtedly punish him as for a contempt for not serving such non-bailable attachment; that deponent also advised the said sheriff that, in deponent's opinion, it was highly probable that, if he went to the Susquehanna Railroad offices, he might meet there also the other defendants, Ramsey and Phelps, and that if he did so, having the order for their arrest in his possession, it would be his duty to serve it, or he would become liable as for an escape; that deponent did not then know nor had he reason to expect that the other defendant, Mr. Henry Smith, would be or was to be at said offices; that deponent then inquired of the said sheriff whether he had any bail-bonds in his possession, and was informed by him that he had not, but that they were at his office in the jail. That deponent then advised the said sheriff that he had better go to his office and get some blank forms, so that if he met either Mr. Ramsey or Mr. Phelps, in searching for Mr. Pruyn, he might serve the order of arrest upon them, and take bail upon the spot with the least possible inconvenience and annoyance to either of them; and that in order to expe-

dite the matter, he had better get his under-sheriff or one of his deputies to accompany him, and that would aid him in filling up the bonds and serving the order of arrest with all the dispatch possible, and without removing either of the defendants from the building in which he might find them; that the said sheriff left the office of this deponent, leaving the said papers in deponent's possession and at deponent's request, to enable him to make a more thorough examination of them during the absence of the said sheriff.

That some little delay occurred before the return of the said sheriff in consequence, as he stated at the time, of not having been able to find a deputy immediately. That when the said sheriff returned he was accompanied by Mr. Dunneny, his under-sheriff. That by that time it had got to be about half-past eleven o'clock A. M., and after returning the papers to the sheriff, deponent again advised him and also the under-sheriff, that if they met Mr. Ramsey or Mr. Phelps, it would be their duty to serve the order of arrest, but to do it with the least possible annoyance or interruption to them, to afford them every possible facility to give bail upon the spot, and not in any way to interfere with or interrupt the business of the election, and that the said sheriff and under-sheriff then left deponent's office together.

Deponent further saith that the primary object of the said sheriff in going to the said office at that time was to serve the said attachment upon the said Robert H. Pruyn, and was not to serve the said order of arrest upon either of the defendants unless he should meet them or either of them accidentally in looking for Mr. Pruyn; and that in the judgment and belief of this deponent the said sheriff would not have gone to said offices at that time or upon that occasion if it had not been for the said attachment, and the same being made returnable forthwith, as before stated, and from the just apprehension which deponent felt that the sheriff would be liable to be punished if Mr. Pruyn was there and the sheriff made no attempt to serve such attachment. That this deponent had no desire or intention or disposition whatever of interrupting or in any way interfer-

ing with the election of the company. That deponent believed at that time that, if the said sheriff should happen to meet with either of the above-named defendants, they could and would give bail upon the spot with less trouble and annoyance to themselves than if they were arrested upon any other occasion, when their bail might not be present, or where, for any reason, they might have to search for or look up bail. Deponent further saith that he never received, from any human being whatever, any hint or intimation or suggestion of any kind in any manner that it was desirable, or that it was wished to have such order of arrest served at the time, and under the circumstances it was served, as hereinbefore stated; nor did the said sheriff, in the judgment and belief of this deponent, and deponent has no reason to imagine or believe that any of the parties interested in the said litigation desired, or in any way procured, said arrest to be made at the time of the holding of such election.

William J. Hadley.

Sworn before me this 30th day of May, 1870,

George M. Cuyler,

Commissioner of Deeds, Albany, N. Y.

SUPREME COURT.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY

against

JOSEPH H. RAMSEY, WILLIAM L. M. PHELPS, ROBERT H. PRUYN, AND HENRY SMITH.

COUNTY OF ALBANY, *ss.:*

Harris Parr, of the City of Albany, being duly sworn, doth depose and say:

1. I am the Sheriff of the County of Albany, and was such sheriff during the whole of the year 1869.

2. On the 7th day of September, 1869, Mr. Martin D. Conway placed in my hands the summons, complaint, order of arrest, and affidavits, in this cause for service. I think it it was about 9 o'clock A. M. He gave me no directions whatever. I asked him if there were any instructions, and he said no, except to do my duty, nor did I have any knowledge beforehand that such papers had been obtained, or that I was to receive the same, and I had no agreement or understanding with any person, express or implied, or any hint or suggestion when, how, or where the papers should be served, except that I acted under the advice of my counsel, Mr. William J. Hadley, of the City of Albany.

3. At the same time that the said Mr. Conway handed me the papers in the suit before mentioned, he also placed in my hands a pluries non-bailable attachment issued out of the special term held at the Court-house in the city of New York, the Hon. George G. Barnard, justice, etc., presiding, commanding me forthwith to attach the said Robert

H. Pruyn, and forthwith to bring him before this court at a special term thereof, to be held at the Court-house, in the City of New York, to answer for his misconduct in the contempt which he was alleged to have committed in disobeying an injunction granted in the Supreme Court in an action wherein Azro Chase was the plaintiff, and the Albany & Susquehanna Railroad Company and others were the defendants. That several attachments against the said Robert H. Pruyn for the same alleged cause had previously been put in my hands for service, and on which attachments I had returned, that the said Pruyn could not be found in this county, he being, as was alleged, absent from this State.

That, as soon as conveniently could be after the receipt of such papers, I proceeded to the office of my counsel, the said William J. Hadley, and submitted the same to him; that, after examining the same, the said Hadley advised me in substance that, if the said Robert H. Pruyn had returned to the City of Albany, he would most likely be found at the Albany & Susquehanna Railroad offices, and that, if he should appear there, and the fact became publicly known, Judge Barnard would doubtless punish me for a contempt if I neglected to serve such attachment, and that it was my duty to proceed to that place to search for the said Robert H. Pruyn, and that my primary object in going there at that time was to execute the said attachment if the said Robert H. Pruyn could be found; and I was further advised by my said counsel that if, in searching for Mr. Pruyn, I met Mr. Ramsey or Mr. Phelps, it would then become my duty to serve the papers and order of arrest in this action, or that I would be liable as for an escape; and that, in serving such papers, I intended to do and did nothing more or less than my official duty required of me without partiality or prejudice to either side, and discharged that duty with as little annoyance and interference with the said defendants as it was possible for me to do.

4. That, upon going to the offices of the said Albany & Susquehanna Railroad Company to serve the said attachment, I did not find the said Robert H. Pruyn, but I did

find the said defendants Joseph H. Ramsey, William L. M. Phelps, and Henry Smith, and I served the said papers before mentioned upon them, as it was my duty to do.

5. I had no design or intention of interrupting or in any way interfering with the election of the company. I was perfectly well satisfied that the said defendants could readily and would give bail upon the spot, as they did. The bail-bond was executed by one or more residents of New York City with whom I was not acquainted; but Mr. Shearman, one of the plaintiff's attorneys who was in the building at the time, requested me to accept them, and signed an approval of their sufficiency in order to exonerate me from liability, and to afford them every facility to give the bail speedily and to release them from the arrest.

Deponent further saith that he never received from any human being any hint or intimation, or suggestion of any kind in any manner, that it was desirable or that it was wished to have such order of arrest served at the time and under the circumstances it was served as hereinbefore stated; and deponent has no reason to imagine that any of the parties interested in said litigation desired such arrest to be made at the time of the holding of such election.

(Signed) HARRIS PARR.

Sworn before me this 30th day of May, 1870,
D. K. PRENTICE, *Notary Public.*

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